PARTIES

In addition to the parties listed in the caption, the following parties were defendants below and are respondents in this case:

Bruce Davis

Regina Mickamisse

Jim Overman

Robert Goodwyn

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cheryl Blanchard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's unpublished order granting respondents' motion for summary judgment and dismissing this action is reproduced in the appendix ("Pet. App.") at 10-19. The Ninth Circuit's December 3, 2007 opinion affirming the district court's order is published at __ F.3d __ (9th Cir. 2007) (*Blanchard II*), and is reproduced at Pet. App. 1-9. That opinion modified *sua sponte* the opinion the court of appeals earlier issued on September 20, 2007.

Ms. Blanchard also appealed an earlier order of the district court. That earlier order, dismissing Ms. Blanchard's claims on exhaustion grounds, which is not officially reported, is reproduced at Pet. App. 28-30. The Ninth Circuit's opinion reversing that order is published at 420 F.3d 918 (9th Cir. 2005) (*Blanchard I*), and is reproduced at Pet. App. 20-27.

JURISDICTION

The Ninth Circuit filed its original opinion on September 20, 2007. On December 3, 2007, the court

of appeals issued *sua sponte* a modified opinion. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 1415(*l*) of Title 20 to the United States Code provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Section 1983 of Title 42 to the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in

an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Sections 1415(i)(2)(A)-(C) of Title 20 to the United States Code provide:

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for

bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

STATEMENT OF THE CASE

This petition arises out of Cheryl Blanchard's ongoing effort—already spanning more than eight years—to ensure that her autistic son, Daniel Blanchard, receives the free appropriate public education mandated by the Individuals with Disabilities Education Act ("IDEA"). The issues regarding Daniel's educational needs initially arose in 1999 when he transferred into the first grade in the Morton School District. This is an action seeking damages for financial losses and injuries sustained by Ms. Blanchard as a result of the respondents' repeated violations of the IDEA. Whether petitioner can recover such relief turns on whether § 1983 provides a cause of action to

enforce the IDEA, a question on which the courts of appeals are sharply divided.

I. THE YEARS OF ADMINISTRATIVE PROCEEDINGS AND COMPLAINTS

In September 1999, first-grader Daniel Blanchard transferred into the Morton School District. Because Daniel was autistic, the IDEA required that the District provide him with a "free appropriate public education," 20 U.S.C. § 1400(d)(1)(A), and adopt for him an effective individualized education plan ("IEP"). Less than a month after Daniel enrolled in the first grade, Ms. Blanchard objected that he was not being provided with the appropriate education mandated by the IDEA.

After Ms. Blanchard's complaints to school officials failed to bring about the needed action, she requested a formal due process hearing required by the IDEA. At that hearing, held over three days in April 2000, Ms. Blanchard represented herself and her son. The District, represented by counsel, called a series of witnesses, including three experts. Despite the obvious disadvantages in proceeding pro se against a defendant represented by skilled counsel and outside experts, Ms. Blanchard prevailed.

The administrative law judge ("ALJ") concluded that "[t]he District's failure to implement the IEP as adopted, failure to revise the IEP when it determined that it was inappropriate, and failure to get the training necessary to properly implement the IEP has

resulted in a denial of" the free appropriate public education to Daniel mandated by the IDEA. E.R.[1] 54. The ALJ made extensive findings regarding the failure of the District to obey the IDEA, identifying at least ten different areas in which the district had "not implemented" the elements of Daniel's IEP, in some cases "wholly" or "completely disregard[ing]" those elements. E.R. 31-52. The ALJ ordered the District to (1) implement Daniel's IEP, including obtaining the necessary training, (2) monitor the implementation of the IEP, including providing monthly progress reports to Ms. Blanchard, and (3) provide compensatory education services to Daniel in order to remedy the District's failure to comply with the IDEA's statutory mandate "during a crucial period in [Daniel's] development." E.R. 54-55.

The 2000 ALJ order, however, was not successful in bringing about compliance with the IDEA. Over the years that followed Ms. Blanchard was forced to file a series of complaints with the District, objecting to repeated violations of Daniel's IEP or to other serious problems. In 2002, following a two-day due process hearing, an ALJ concluded that the District had failed to meet the requirement of the IDEA that it provide Daniel with extended school year services. E.R. 68. In 2003, Ms. Blanchard had to initiate yet another due process hearing, asserting among other

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[1] "E.R." refers to the Excerpts of Record filed with the Ninth Circuit in *Blanchard II*.

things that the District had improperly interfered with an evaluation of Daniel and that the District staff assigned to work with Daniel were not adequately trained or skilled. The issues raised by that complaint were settled after the hearing began. E.R. 148-49. In 2005, Ms. Blanchard filed yet another complaint, this time with the Office of Superintendent of Public Instruction ("OSPI"), asserting that the District had not properly implemented Daniel's IEP in a number of respects, including by failing to provide her with certain required written notices, failing to provide Daniel with a communication device that was required by the IEP, failing to implement portions of the IEP, and failing to prepare adequate progress reports as required by the IEP. E.R. 150. The OSPI sustained Ms. Blanchard's contention that the District did not adequately implement Daniel's IEP. E.R. 150-52. Since 1999, Ms. Blanchard has prevailed at other due process hearings and made additional complaints to the District that were resolved before hearing, or without resort to such a hearing.

II. THE PROCEEDINGS BELOW

Before the end of these administrative proceedings and complaints, Ms. Blanchard filed the complaint at issue here, seeking redress under § 1983 for the asserted violations of the IDEA. The complaint requested damages for the emotional distress and over $25,000 in lost income that Ms. Blanchard had

suffered during her ultimately successful efforts to obtain benefits for Daniel under the IDEA. E.R. 9.

In 2003, the District Court dismissed Ms. Blanchard's complaint, reasoning that she had failed to exhaust administrative remedies under the IDEA. Pet. App. 29-30. In 2005, the Ninth Circuit reversed. The court of appeals held that because Ms. Blanchard sought monetary relief on her own behalf, rather than on behalf of her son, there were no administrative remedies for her to exhaust under the IDEA. Pet. App. 21-22, 25-27. In so holding, it acknowledged that "the remedies available under the IDEA . . . do not provide an adequate remedy for Blanchard." Pet. App. 25 (citation omitted).

On remand, the District court again dismissed Ms. Blanchard's claims as a matter of law. The District Court reasoned that the IDEA only establishes rights for children with disabilities, not for their parents. Because on this view Ms. Blanchard "ha[d] no individually enforceable right under the IDEA," there was no right that she could enforce by means of § 1983. Pet. App. 16.

While this case was again pending on appeal, this Court decided *Winkelman ex rel. Winkelman v. Parma City School District*, __ U.S. __, 127 S. Ct. 1994 (2007). *Winkelman* held that parents themselves, as well as their disabled children, have rights under the IDEA. *Id.* at 2005. The Ninth Circuit recognized that "in light of *Winkelman*, the district

court was not correct in ruling that the IDEA creates no individual rights in parents." Pet. App. 8.

The Ninth Circuit nonetheless affirmed the dismissal of Ms. Blanchard's complaint. The court of appeals reasoned that statutory requirements established by the IDEA can only be enforced in a civil action under the IDEA itself. Pet. App. 4-8; 20 U.S.C. § 1415(i)(2). Although § 1983 ordinarily provides a cause of action to enforce rights created by federal statutes, the court of appeals concluded that the IDEA itself is a "comprehensive . . . scheme" evincing a congressional intent not to permit enforcement of the IDEA by means of a § 1983 action. Pet. App. 8. The court rejected Ms. Blanchard's argument that a 1986 amendment to what is now the IDEA, 20 U.S.C. § 1415(*l*), preserves such § 1983 claims. Pet. App. 6-8.

The court of appeals candidly acknowledged that its decision was in conflict with decisions on the same issue in the Second and Seventh Circuits. "There is an existing circuit split on whether, with the [1986] amendment, Congress intended the IDEA rights to be enforceable under § 1983." Pet. App. 6.

REASONS FOR GRANTING THE PETITION

I. THERE IS A WELL-ESTABLISHED INTER-CIRCUIT CONFLICT REGARDING WHETHER § 1983 PROVIDES A CAUSE OF ACTION TO ENFORCE THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

This case presents a mature and intractable inter-circuit conflict regarding whether § 1983 provides a cause of action to enforce the IDEA. This growing conflict has existed for over a decade. Today ten circuits have addressed the question. Four circuits have concluded that § 1983 does provide such a cause of action, and would permit the claim in the instant case to proceed. Six circuits, including the Ninth Circuit in the instant case, have concluded to the contrary that § 1983 cannot be utilized to enforce the IDEA.

This conflict has its roots in this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* concerned the availability of a § 1983 action under the Education for All Handicapped Children Act ("EHA"), the statute later superseded by the IDEA.[2] *Smith* held that the EHA itself provides the exclusive

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[2] Many of the provisions in the IDEA were originally enacted as the EHA. In 1990, Congress renamed this legislation the Individuals with Disabilities Education Act. The changes in this legislation, other than the adoption of § 1415(*l*), are not material to this litigation. For simplicity we have substituted bracketed references to the IDEA in decisions that in fact reference the EHA.

means of enforcing any rights related to the education of disabled children in public primary and secondary schools. More specifically, *Smith* concluded that § 1983 could not be utilized to enforce such rights. Noting that the EHA, unlike § 1983, contains a specific exhaustion requirement, the Court reasoned that

> [i]f § 1983 stood as an independent avenue of relief for petitioners, then they could go straight to court to assert it. . . . [Section] 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy. . . . In this case, we think Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme.

Id. at 1012 (citations and footnote omitted).

In response to *Smith*, Congress adopted the Handicapped Children's Protection Act of 1986. *See* Pub. L. No. 99-372, 100 Stat. 796. Section 3 of that Act, codified in 20 U.S.C. § 1415(*l*), now provides with regard to the IDEA:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws

> seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

The effect of § 1415(*l*) is to permit plaintiffs to seek to utilize "procedures[ ] and remedies" not included in the IDEA itself, provided that they first exhaust any administrative remedies available to them under the IDEA.

The courts of appeals are sharply divided regarding whether the "procedures[ ] and remedies" authorized by § 1415(*l*) include an action under § 1983, including an action under § 1983 to enforce the IDEA, or its predecessor the EHA. The question is important because the remedies provided by § 1983 may not be available under the IDEA itself.

A. The Second, Fifth, Sixth, and Seventh Circuits Have Concluded That § 1983 Provides a Cause of Action to Enforce the IDEA.

The Second Circuit was the first court of appeals to address this question. *Mrs. W. v. Tirozzi*, 832 F.2d 748, 754-56 (2d Cir. 1987). In resolving the issue only a year after the enactment of § 1415(*l*), the Second Circuit relied heavily on the fact that both the House Report and the Conference Report regarding § 1415(*l*)

expressly stated that § 1983 actions would be permitted. *Id.* at 754-55.[3] "In light of this clear legislative history, we hold that parents are entitled to bring a § 1983 action based on alleged violations of the [IDEA]." *Id.* at 755.

In *Weixel v. Board of Education of New York*, 287 F.3d 138, 151 (2d Cir. 2002), the Second Circuit reaffirmed its view that § 1983 provides a cause of action to enforce the IDEA, specifically sustaining a § 1983 action for damages caused by a violation of the IDEA. Earlier this year that court of appeals again reiterated that in the Second Circuit "[i]t is well-settled that, while the IDEA itself does not provide for monetary damages, plaintiffs may sue pursuant to § 1983 to enforce its provisions . . . and to obtain damages for violations of such provisions." *Smith v. Guilford Bd. of Educ.*, No. 06-1094-cv, 2007 WL 1725512, at **4 (2d Cir. June 14, 2007).

In *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997), the Seventh Circuit also concluded that § 1415(*l*) provides a civil action to enforce the IDEA.

> [Section] 1415([*l*]) makes clear that Congress intended that a § 1983 remedy be available to the beneficiaries of the statute. . . . [Section] 1415([*l*]) was enacted in response to the

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[3] At the time of this decision what is now § 1415(*l*) was contained in § 1415(f). For simplicity we have substituted bracketed references to § 1415(*l*) in decisions that in fact reference the same provision when it was codified as § 1415(f).

> Supreme Court's decision in *Smith v. Robinson*. . . . *Smith* had held that. . . . [IDEA]'s extensive administrative scheme . . . foreclosed a § 1983 or similar action. Congress responded by enacting § 1415([*l*]) which allowed . . . § 1983 claims under the [IDEA]. . . .
>
> . . . [Section] 1415([*l*]) was enacted for the express purpose of ensuring that § 1983 claims would be available to enforce the [IDEA].

Id. at 621-22 (footnotes and citations omitted).

The Fifth Circuit has aligned itself with the Second and Seventh Circuits. In *Angela L. v. Pasadena Independent School District*, 918 F.2d 1188 (5th Cir. 1990), the court stated that by enacting the 1986 amendment to the IDEA Congress "rejected the Court's conclusion in *Smith* that the [IDEA] was an 'exclusive remedy.' 20 U.S.C. § 1415([*l*]). Consequently, parents may continue to allege violations of 42 U.S.C. § 1983 and section 504 of the Rehabilitation Act. These statutes permit parents to obtain relief which otherwise is unavailable from the [IDEA]." *Id.* at 1193 n.3. In light of *Angela L.*, the availability of § 1983 actions is "well settled" in the Fifth Circuit. *Pace v. Bogalusa City Sch. Bd.*, No. Civ.A. 99-806, 2001 WL 969103, at *2 (E.D. La. Aug. 23, 2001)

(citing *Angela L.*), *aff'd in part on other grounds*, 403 F.3d 272 (5th Cir. 2005) (en banc).[4]

Finally, in *Gean v. Hattaway*, 330 F.3d 758 (6th Cir. 2003), the Sixth Circuit held that a plaintiff may bring an action pursuant to § 1983 for damages based on underlying violations of the IDEA, and that when a plaintiff's claim for money damages seeks relief not available under the IDEA, the plaintiff need not exhaust administrative remedies provided for in the Act. *Id.* at 774 ("It is when a plaintiff has a legitimate claim for 'general damages' not available under the IDEA that we have been willing to allow her to by-pass the administrative process detailed in that statute. . . .").[5]

B. Six Other Circuits Hold That § 1983 Does Not Provide a Cause of Action to Enforce the IDEA.

The Third Circuit has expressly rejected the view of the Second, Fifth, Sixth, and Seventh Circuits that § 1415(*l*) assures the viability of a § 1983 claim. *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 802-03 (3d Cir.

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[4] *See also R.J. v. McKinney Ind. Sch. Dist.*, No. 4:05CV257, 2005 WL 3576839, at *3 (E.D. Tex. Dec. 29, 2005) (citing *Angela L.*); *Doe ex rel. Doe v. S & S Consol. I.S.D.*, 149 F. Supp. 2d 274, 303 (E.D. Tex. 2001) (citing *Angela L.*), *aff'd*, 309 F.3d 307 (5th Cir. 2002).

[5] Because the plaintiff in *Gean* was seeking restitution for past payments for educational services, the Sixth Circuit concluded that exhaustion of these claims was required. *Id.*

2007) (en banc). The Third Circuit disagreed in particular with the Seventh Circuit's reliance on the legislative history of § 1415(*l*).

> We . . . reject [the plaintiff's] contention that the references to § 1983 in the legislative history of § 1415(*l*) show that Congress intended to preserve the availability of § 1983 to remedy violations of IDEA-created rights. . . .
>
> . . . Given th[e] comprehensive scheme [in the IDEA], Congress did not intend § 1983 to be available to remedy violations of the IDEA. . . .

Id. at 803 (footnote and citations omitted). The Ninth Circuit in the instant case adopted a similar view, explaining that the court was "persuaded by" the Third Circuit decision in *A.W.*, and quoting the Third Circuit's reasoning that the "comprehensive scheme" in the IDEA precluded enforcement under § 1983. Pet. App. 7.

In *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 28 (1st Cir. 2006), the First Circuit held that § 1983 could not be used to enforce the IDEA because that would permit a plaintiff in a § 1983 action to obtain remedies that were not provided by the IDEA itself. The Eighth Circuit relied on the same reasoning to reject § 1983 actions to enforce the IDEA. "[P]laintiffs' claims based upon defendants' alleged violations of the IDEA may not be pursued in this § 1983 action because general and punitive damages for the types of injuries alleged by plaintiffs are not available

under the IDEA." *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996).

In *Padilla ex rel. Padilla v. School District No. 1, Denver*, 233 F.3d 1268, 1273-74 (10th Cir. 2000), the Tenth Circuit reasoned that this Court's post-*Smith* decisions preclude use of § 1983 to enforce the IDEA. On two occasions since *Smith*, the court of appeals noted, the Court has continued to cite *Smith* in determining the availability of § 1983 to remedy violations of a statute. "Based on these cases, it appears the Supreme Court considers *Smith* to be alive and well insofar as it asserts that § 1983 may not be used to remedy IDEA violations." *Id.* at 1274.

In *Sellers ex rel. Sellers v. School Board of Manassas*, 141 F.3d 524, 529-31 (4th Cir. 1998), the Fourth Circuit rejected on a different ground reliance on § 1983 to enforce the IDEA. Section 1415(*l*), the Fourth Circuit reasoned, allows only § 1983 actions to enforce constitutional rights related to the education of disabled children, but does not permit § 1983 actions to enforce statutory rights, such as the rights created by the IDEA. "[S]ection 1415([*l*]) does permit plaintiffs to resort to section 1983 for *constitutional* violations, notwithstanding the similarity of such claims to those stated directly under IDEA. But section 1415([*l*]) does not permit plaintiffs to sue under section 1983 for an IDEA violation, which is

statutory in nature." *Id.* at 530 (emphasis in original).[6]

C. This Inter-Circuit Conflict Is Widely Recognized.

The Ninth Circuit's decision below candidly recognized the well-established inter-circuit conflict that exists about this recurring question of law.

> There is an existing circuit split on whether, with the amendment [adding section 1415(*l*)], Congress intended the IDEA rights to be enforceable under § 1983. The First, Third, Fourth, and Tenth Circuits have held that Congress did not so intend. The Second and Seventh Circuits have held that Congress did so intend. . . . *See A.W. v. Jersey City Pub. Sch.* . . . (surveying the existing circuit split . . .).

Pet. App. 6-7 (footnotes omitted).[7]

In *Padilla*, the Tenth Circuit acknowledged that the "[c]ircuits that have addressed the question [of whether § 1983 may be used to enforce the IDEA]

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[6] The Sellers urged the Fourth Circuit to adopt the contrary position. *See* Brief for Appellants, *Sellers*, 141 F.3d 524 (No. 97-1762), 1997 WL 33492433, at *17-21, 29-38.

[7] In its briefing before the Ninth Circuit, the District likewise acknowledged the split among the circuits on this issue. *See* Brief of Appelles [sic] at 13-14, 17, *Blanchard II*, __ F.3d __ (No. 06-35388) (discussing, inter alia, the Fourth Circuit's opinion in *Sellers* and the Second Circuit's opinion in *Mrs. W.*).

have not come to the same conclusion." 233 F.3d at 1272. In *A.W.*, the Third Circuit pointed out that "reasonable minds have differed as to the . . . interpretation of the congressional reaction to *Smith v. Robinson* embodied in § 1415(*l*)." 486 F.3d at 797; *id.* at 798 ("[T]he issue ha[s] created a circuit split."). The Third Circuit noted that decisions in the Second and Seventh Circuits "have concluded that Congress intended to allow recourse to § 1983 to remedy IDEA violations," *id.* at 799 n.12, while decisions in the Fourth and Tenth Circuits had reached the opposite conclusion, *id.* at 797-98.

Many district courts have likewise recognized that the circuits are split on this issue. Earlier this year, the court in *Carney ex rel. Carney v. Nevada ex rel. Department of Education*, No. 03:05-CV-00713-LRH-RAM, 2007 WL 777697 (D. Nev. Mar. 12, 2007), *clarified on other grounds by* 2007 WL 3256573 (D. Nev. Oct. 31, 2007), observed that "[t]here is a split of authority in the federal circuits as to whether redress for violations of IDEA may be pursued through a § 1983 claim." *Id.* at *2. The Connecticut District Court in *M.H. v. Bristol Board of Education*, 169 F. Supp. 2d 21 (D. Conn. 2001), similarly noted "[t]here is currently a split among the circuit courts regarding whether the IDEA provides the exclusive remedy for violations of its provisions, or whether § 1983 is available to assert a cause of action for damages." *Id.* at 28. Several other decisions have also recognized this well-established conflict. *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 114 (D.D.C. 2000)

("The circuits are split on the issue of whether section 1983 claims may be premised on IDEA violations."); *Goleta Union Elem. Sch. Dist. v. Ordway*, 166 F. Supp. 2d 1287, 1292 (C.D. Cal. 2001) (discussing the "split of opinion among the Courts of Appeals regarding the relationship between section 1983 and the IDEA"), *overruled on other grounds by Blanchard II*, __ F.3d __; *Andrew S. ex rel. Margaret S. v. Sch. Comm. of Greenfield*, 59 F. Supp. 2d 237, 242 (D. Mass. 1999) (noting "a split of opinion among the Courts of Appeals regarding the relationship between section 1983 and the IDEA").

II. THE QUESTION PRESENTED INVOLVES A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE.

The decision below creates a system of economic incentives that undermines both the interest of disabled children and their parents in obtaining an effective education and the due administration of justice.

For the parents of a disabled child, the Ninth Circuit decision results in a powerful incentive to hire an attorney to handle disputes with local school officials rather than attempting to resolve education issues without the assistance or involvement of counsel. The IDEA provides that parents who retain counsel to pursue IDEA rights, and who ultimately prevail on the merits of those claims, are entitled to an award of counsel fees. 20 U.S.C. § 1415(i)(3)(B)(i)(I).

Thus, in the instant case, if Ms. Blanchard had retained an attorney to handle the protracted struggle required to obtain an appropriate education for her son, she would have been entitled to an award of counsel fees that could easily have totaled hundreds of thousands of dollars.

Ms. Blanchard took the far less costly course of pursuing the proceedings pro se. Although doing so forced her to forego $25,000 in self-employment income, that was only a fraction of the cost that would have been incurred—and for which the school board would have been liable—if Ms. Blanchard had instead retained an attorney. The Ninth Circuit decision, by holding that the parent of a disabled child can never obtain redress for costs incidental to self-representation, strongly encourages parents able to do so to opt for the more expensive alternative of retaining counsel to pursue IDEA claims that the parents themselves might have been able to obtain on their own. Whether the resulting additional cost is ultimately borne by the school district (because the parents prevail) or by the parents (because they do not), that incentive is highly undesirable.

Many parents, however, will not be able to afford to hire attorneys to enforce their IDEA rights, even though under the Ninth Circuit decision that is the only way the parents could obtain recompense for the expense involved in winning an effective education for their children. Most families are not in a position to pay (or incur liability for) the tens of thousands of dollars in legal fees that would be involved in even a

modest administrative proceeding. *See Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 362 (2d Cir. 2006) (awarding counsel fee of $34,567), *cert. denied*, 128 S. Ct. 436 (2007); Adam Liptak, *Nonlawyer Father Wins His Suit Over Education, and the Bar Is Upset*, N.Y. Times, May 6, 2006, at A8 (stating that family could not afford to hire a lawyer to represent them in their IDEA case and that one lawyer quoted them $60,000 to handle the case). The potential legal bills will at times be greater than the cost of simply giving up on the public schools and paying tuition at a private school willing—for a fee—to provide an effective education to the disabled child.

If a child's parents, after unsuccessful efforts to obtain a free appropriate public education, are forced (and have the financial ability) to put the child in a private school, a subsequent successful challenge to the school board's practices will entitle the parents to reimbursement for those private school expenses. *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985). But many families do not have the financial ability to pay for such private education in the hope that, at some point in the future, an administrative or judicial determination will entitle them to reimbursement. *Id.* at 370 (option of educating disabled children in private schools is available only to "conscientious parents who have adequate means"). Parents of children with disabilities are substantially more likely than others to have

income below the poverty level.[8] Thus, for many families with disabled children, the only financially realistic option is to keep their children in public schools and attempt—without the assistance of counsel, and without hope of an award of counsel fees or tuition reimbursement—to pursue their rights through pleas to school officials and resort to the administrative process.

In dealing with such families under the Ninth Circuit decision, school officials have an obvious financial interest in refusing to comply with the IDEA, postponing as long as possible—indefinitely, perhaps—providing the free appropriate public education guaranteed by federal law. Providing such an effective education to a disabled child can be expensive, in some cases substantially so.[9] If an effective education requires

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[8] Children with disabilities are disproportionately raised by households in poverty. "At 24%, the rate of poverty among the households of students with disabilities is higher than the 16% found in the general population. Despite the fact that parents are about equally likely to be employed, households of students with disabilities are much more likely to have low and very low incomes." *See* Mary Wagner & Jose Blackorby, *Overview of Findings from Wave 1 of the Special Education Elementary Longitudinal Study* (SEELS) (June 2004) at 5, *available at* http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf.

[9] For this reason, the IDEA provides "billions of dollars to States" to defray these costs. Brief for the United States as Intervenor at 4, *A.W.*, 486 F.3d 791 (02-2056) ("The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, is a federal grant program that provides billions of dollars to States to educate children with disabilities.").

placing a disabled child in a private school, a school district that ultimately agrees (or is forced) to do so will be required to pay tuition bills that can easily total in the tens of thousands of dollars. Each year that the school board refuses to provide the appropriate education mandated by the IDEA represents a substantial financial savings to the school district, either in internal costs or in payments for outside tuition.

In the Second, Fifth, Sixth, and Seventh Circuits, school officials have a substantial financial incentive to comply with the IDEA. If the parents of the disabled child ultimately prevail in those circuits, they may be entitled in a § 1983 action to a damage award that exceeds the money the school district initially saved by failing to provide the child with an effective education. But in the Ninth Circuit, a school board's intransigence shifts those costs to the families of the disabled children, in the form of damage to the children or their parents or the expenses (including related losses in income) of pursuing their claims pro se.

The Ninth Circuit's decision results in a dual system for children with disabilities. If their parents are well off—and can afford to hire an attorney and pay for private schooling until a dispute is resolved—the children will suffer no educational harms, and their parents may be fully reimbursed for every dollar spent in connection with the dispute. The prospect of ultimately having to pay for those attorneys' fees and tuition bills provides a school district with a persuasive economic reason to respect the rights of children of affluent parents. But if a child has parents

of modest means, injuries the child suffers during the duration of the dispute, and any injuries and financial costs and losses to the family, will never be redressed. For as long as it postpones complying with the IDEA, the decision below spares a school district the cost of providing an appropriate public education, and transfers that burden, in the form of uncompensated damages, to the less affluent families of children with disabilities.

The circumstances of *Board of Education of the City School District of New York v. Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) (per curiam), illustrate this dual system. The father in that case, the former chief executive of Viacom, had unlimited assets with which to pursue his IDEA claim and thereby ensure that his child received the education mandated by the IDEA.[10] He had the resources needed both to place his child in private school, despite an annual tuition of over $21,000, and to hire a lawyer to represent himself and his son throughout a decade-long battle with the school district, including due process hearings and a subsequent court action.[11] For the fortunate few, the Ninth Circuit decision leaves in place a highly efficacious remedial scheme. But if the Ninth

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[10] *See* David Stout & Jennifer Medina, *With Justices Split, City Must Pay Disabled Student's Tuition*, N.Y. Times, Oct. 11, 2007, at B1.

[11] Brief for Petitioner at 6-18, *Tom F.*, 128 S. Ct. 1 (No. 06-637). Mr. F. even brought a representative from his attorney's office to the Committee on Special Education meeting called to design Gilbert F.'s IEP. *Id.* at 7.

Circuit's opinion is permitted to stand, then for ordinary parents, like Ms. Blanchard, hard-fought struggles to obtain an appropriate education for their children may lead to no more than pyrrhic victories.

CONCLUSION

For each of these reasons, this Court should grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHERYL BLANCHARD,

Plaintiff-Appellant,

v.

MORTON SCHOOL DISTRICT; RUSS DAVIS, Superintendent; REGINE ALEKSUNAS, SE Teacher; JIM GROSSMAN, SLP; ROBYN GOODWIN, Principal,

Defendants-Appellees.

No. 06-35388

D.C. No. CV-02-05101-FDB

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted
July 31, 2007 – Portland, Oregon

Filed September 20, 2007
Amended December 3, 2007

Before: Alfred T. Goodwin, Mary M. Schroeder, and Susan P. Graber, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

Lonnie Davis, Disabilities Law Project, Seattle, Washington, for the plaintiff-appellant.

Jocelyn J. Lyman, Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S., Olympia, Washington, for the defendants-appellees.

ORDER

The Opinion filed on September 20, 2007, is amended as follows: on slip Opinion page 12821, remove lines 21 through 34, and insert the following text:

> Blanchard also brings claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and title II of the ADA, 42 U.S.C. § 12132. Under those statutes, Blanchard is a proper plaintiff, at least insofar as she is asserting and enforcing the rights of her son and incurring expenses for his benefit. *See Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1115 (9th Cir. 1987); *see also Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 46-47 (2d Cir. 1997) (holding that a hospital had standing to sue under the Rehabilitation Act and the ADA), *superseded on other grounds, as recognized in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). As the Supreme Court has noted, "a parent of a child with a disability has a particular and personal interest" in preventing discrimination against the child. *Winkelman*, 127 S. Ct. at 2003.
>
> Blanchard is not entitled to the damages that she seeks, however. We need not decide

whether damages are available for a parent's own emotional distress resulting from the enforcement of a child's educational rights, because Blanchard abandoned that claim by failing to raise it in her brief on appeal. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Her claim for lost profits essentially seeks compensation for acting as her own lawyer. Pro se plaintiffs, though, are not entitled to attorney's fees. *See Kay v. Ehrler*, 499 U.S. 432, 438 (1991). Because Blanchard cannot recover damages, the district court properly dismissed her Rehabilitation Act and ADA claims.

No future petitions for rehearing or petitions for rehearing en banc will be entertained.

OPINION

SCHROEDER, Circuit Judge:

Plaintiff-Appellant Cheryl Blanchard seeks damages to compensate her for lost income and the emotional distress she experienced during her ultimately successful efforts to obtain benefits for her son under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482. When this matter was before us previously, we reversed the district court's dismissal for failure to exhaust administrative remedies. *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918 (9th Cir. 2005) ("*Blanchard I*"). We held that, because Blanchard sought damages on her own behalf rather than her son's, no administrative remedies

existed. *Id.* at 921-22. We expressed no opinion on the merits of her claim. *Id.* at 922.

On remand, the district court granted summary judgment for Defendants, holding that Blanchard had no individual rights under the IDEA and that the IDEA's enforcement scheme did not contemplate the damages she seeks. It further held that, because Blanchard is not a qualified individual with a disability, her claim is not cognizable under either title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12132, or section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). *See* 42 U.S.C. § 12132; 29 U.S.C. § 705(20).

After the district court's entry of summary judgment, however, the United States Supreme Court held that parents do have individually enforceable substantive rights under the IDEA. *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 1999 (2007). The Court said that those rights were sufficient to permit a parent to appear pro se in pursuit of IDEA remedies to secure for a child the free appropriate public education guaranteed under § 1415 of the IDEA. *Id.* at 2005.

We have held that money damages are not available under the IDEA for the pain and suffering of a disabled child. *Witte ex rel. Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999). The question before us now is whether 42 U.S.C. § 1983 creates a cause of action for money damages under the IDEA for the lost earnings and suffering of a parent

pursuing IDEA relief. We hold that it does not. We affirm the district court's judgment in favor of the school district after taking into account the intervening Supreme Court decision in *Winkelman*.

Section 1983 does not in itself create any right under federal law. It provides remedies for violations of federal rights only where a "federal statute creates an individually enforceable right in the class of beneficiaries to which [plaintiff] belongs." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005).

In *Winkelman*, 127 S. Ct. at 1999, the Supreme Court provided a thorough analysis of the IDEA's "interlocking statutory" enforcement scheme. The Court catalogued the IDEA's numerous provisions creating substantive rights, and it concluded that the statute confers those rights on the parents of disabled children as well as on the children themselves. *Id.* at 2000-05. Notably, all the rights created by the statute, including the rights to reimbursement of expenses and to recovery of attorney's fees, relate to necessary efforts to secure a child's free appropriate public education. *See* 20 U.S.C. § 1400(d)(1)(A)-(B) (stating that the IDEA's substantive and procedural protections exist in order to "ensure that all children with disabilities have available to them a free appropriate public education" and to protect the rights of the parents of such children in the process of ensuring the children's access to education); 20 U.S.C. § 1415(b)(6) (providing a judicial remedy for

violations of any right "relating to the identification, evaluation, or educational placement of [a] child").

In *Smith v. Robinson*, 468 U.S. 992, 1013 (1984), the Supreme Court held that the Education of the Handicapped Act ("EHA"), the predecessor to the IDEA, was the exclusive means of remedying violations of the rights it guaranteed. In response, Congress amended the statute to include what now is 20 U.S.C. § 1415(1).[1] Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 3, 100 Stat. 796, 797. There is an existing circuit split on whether, with the amendment, Congress intended the IDEA rights to be enforceable under § 1983.[2] The First, Third, Fourth, and Tenth Circuits have held that Congress did not so intend.[3] The Second and Seventh

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[1] "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities. . . ." 20 U.S.C. § 1415(1) (citations omitted).

[2] In *Department of Education v. Katherine D.*, 727 F.2d 809, 820 (9th Cir. 1984), we held that the EHA's "comprehensive and exclusive remedial scheme . . . precludes reliance upon a cause of action under section 1983." However, we decided *Katherine D.* before Congress amended the IDEA. Consequently, although our holding today is consistent with it, *Katherine D.* cannot answer the question of what Congress intended when it amended the IDEA.

[3] *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 28 (1st Cir. 2006); *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 803 (3d Cir. 2007) (en banc); *Sellers v. Sch. Bd.*, 141 F.3d 524, 529 (4th Cir.

(Continued on following page)

Circuits have held that Congress did so intend.[4] The Eighth Circuit has holdings going both ways.[5] We are persuaded by the recent thoughtful, well-reasoned opinion of the Third Circuit. *See A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 797-803 (3d Cir. 2007) (en banc) (surveying the existing circuit split and analyzing recent Supreme Court precedent on the availability of § 1983 as a remedy for violation of a federal statute).[6] In *A.W.*, the Third Circuit overruled its prior authority to the contrary and held:

> The IDEA includes a judicial remedy for violations of any right "relating to the identification, evaluation, or educational placement of [a] child, or the provision of a free appropriate public education to such child." § 1415(b)(6). Given this comprehensive scheme, Congress

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1998); *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1273 (10th Cir. 2000).

[4] *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987); *Marie O. v. Edgar*, 131 F.3d 610, 622 (7th Cir. 1997).

[5] *Compare Digre v. Roseville Sch. Indep. Dist. No. 623*, 841 F.2d 245, 250 (8th Cir. 1988) ("Mrs. Digre was entitled to bring a section 1983 action based on alleged violations of the [predecessor to the IDEA]. . . ."), *with Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996) ("We now hold as a matter of law that plaintiffs in the present case cannot recover general or punitive damages [under § 1983] arising out of defendants' alleged violations of the IDEA. . . ."; failing even to mention or cite *Digre*).

[6] We note that the holdings of the Second and Seventh Circuits predate recent Supreme Court precedent on the availability of § 1983 actions, and the Second Circuit's opinion does not discuss congressional intent at all.

> did not intend § 1983 to be available to remedy violations of the IDEA. . . .

Id. at 803 (alteration in original). We now join the First, Third, Fourth, and Tenth Circuits and hold that the comprehensive enforcement scheme of the IDEA evidences Congress' intent to preclude a § 1983 claim for the violation of rights under the IDEA.

Therefore, in light of *Winkelman,* the district court was not correct in ruling that the IDEA creates no individual rights in parents. However, insofar as the district court held that IDEA does not contemplate the remedy Blanchard seeks and in that regard creates no right enforceable under § 1983, the district court must be affirmed.

Blanchard also brings claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and title II of the ADA, 42 U.S.C. § 12132. Under those statutes, Blanchard is a proper plaintiff, at least insofar as she is asserting and enforcing the rights of her son and incurring expenses for his benefit. *See Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1115 (9th Cir. 1987); *see also Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 46-47 (2d Cir. 1997) (holding that a hospital had standing to sue under the Rehabilitation act and the ADA), *superseded on other grounds, as recognized in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). As the Supreme Court has noted, "a parent of a child with a disability has a particular and personal interest" in preventing

discrimination against the child. *Winkelman*, 127 S. Ct. at 2003.

Blanchard is not entitled to the damages that she seeks, however. We need not decide whether damages are available for a parent's own emotional distress resulting from the enforcement of a child's educational rights, because Blanchard abandoned that claim by failing to raise it in her brief on appeal. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Her claim for lost profits essentially seeks compensation for acting as her own lawyer. Pro se plaintiffs, though, are not entitled to attorney's fees. *See Kay v. Ehrler*, 499 U.S. 432, 438 (1991). Because Blanchard cannot recover damages, the district court properly dismissed her Rehabilitation Act and ADA claims.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHERYL BLANCHARD, Plaintiff, v. MORTON SCHOOL DISTRICT, et al., Defendant.	Case No. CV 02-5101 FDB ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSAL (Filed April 20, 2006)

Before the court is the motion of Defendants (collectively referred to as the "District") for summary judgment dismissal of all claims of Plaintiff Cheryl Blanchard. The court, having considered the motion, response, and affidavits of the parties, finds that Ms. Blanchard's claims are not cognizable under applicable law and must, therefore, be dismissed.

I. Procedural Background

Ms. Blanchard filed this case in May, 2002. On July 18, 2003, the court granted the District's motion to dismiss, dismissing the case on the basis that Ms. Blanchard had failed to exhaust her administrative remedies under the Individuals with Disabilities Education Act (IDEA). On August 19, 2005, the Ninth Circuit Court of Appeals reversed and remanded the case, holding that the complaint could not be dismissed for failure to exhaust administrative remedies as the IDEA provides no remedy for Ms. Blanchard.

The Ninth Circuit's holding was limited to the exhaustion issue. *Blanchard v. Morton School District, et al.*, 420 F.3d 918, 922 (9th Cir. 2005). The Ninth Circuit was not called upon to decide whether any of Ms. Blanchard's claims for damages is substantively cognizable under federal law or whether her claims are meritorious.

Ms. Blanchard alleges that she is entitled to damages for lost profits from her floral manufacturing business from 1999 to 2001 for time spent "dealing with hearings and learning the law." She also seeks damages for emotional distress.

II. Factual Background

Ms. Blanchard is the mother of Daniel, a student who receives special education at the Morton School District, a small district located in Lewis County, Washington. In 2000, Ms. Blanchard pursued her first due process hearing concerning services provided to her son during the 1999/2000 school year. The ALJ determined that the District had not implemented the Individualized Education Program (IEP) for Daniel during the 1999/2000 school year and had not adequately trained staff to implement the IEP. The District was ordered to implement the IEP, obtain more training for staff and provide 100 hours of compensatory education for Daniel.

In 2001, Ms. Blanchard pursued a second hearing based on her concern that the length of the Extended School Year (ESY) services the District offered to

provide Daniel for the summer of 2001 was insufficient. The ALJ ruled that the District's proposal concerning ESY services complied with the requirements of the IDEA.

In June 2001, Ms. Blanchard pursued a third due process hearing, claiming that the District had failed to timely identify ESY services for Daniel following the 1999/2000 school years, that he had not been allowed to go on field trips during the 1999/2000 school year, that the District had not properly implemented the order entered after the first due process hearing, and that Daniel's IEP was not followed during the 2000/2001. Several issues were dismissed by the ALJ at a summary judgment proceeding and Ms. Blanchard thereafter requested that the hearing be cancelled, resulting in an order of dismissal.

In 2003, Ms. Blanchard pursued a fourth hearing but, the matter was settled prior to a hearing.

III. Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corporation v. Catrett,* 477 U.S. 317, 106 S.Ct. 2648 (1986). Failure of proof as to any essential element of plaintiff's claims means that no genuine issue of material fact can exist

and summary judgment is mandated. *Id.*, 106 S.Ct. at 2552.

This issues [sic] on the instant motion are legal, rather than factual. The District argues that Ms. Blanchard's claims fail because they are not cognizable under applicable law. Ms. Blanchard provides additional facts relating to the previous administrative hearings that are not material to the legal issue of whether her damage claims are legally cognizable under the IDEA, ADA, Rehabilitation Act or § 1983.

IV. Discussion

A. Claim for Damages Under the IDEA

Ms. Blanchard claims that she is entitled to damages under the IDEA for emotional distress and loss of profits for time she spent dealing with hearings and learning the law, during 1999/2001 when she was participating in the due process hearings on her son's behalf.

Monetary damages for retrospective and non-educational injuries are not available under the IDEA. *Blanchard,* 420 F.3d at 921. As noted by the Ninth Circuit, "[t]he remedies available under the IDEA include educational services for disabled children. *See* 20 U.S.C. §§ 1400-1482. They do not provide an adequate remedy for Blanchard." Ms. Blanchard had no administrative remedies under the IDEA to exhaust because she had resolved the educational issues implicated by her son's disability and had

obtained the educational relief available under the IDEA on behalf of her son. *Id.* The Court stated further that Ms. Blanchard's claims for "emotional distress injuries and lost income could not be remedied through the educational remedies available under the IDEA. *Id. citing Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999).

Ms. Blanchard argues that she is seeking reimbursement rather than monetary damages. Ms. Blanchard's reliance on *Bucks County Dept. of Mental Health/Mental Retardation v. Commonwealth of Pennsylvania, Dept. of Public Welfare,* 379 F.3d 61 (3rd Cir. 2004), however, is misplaced. In that case, expenses were incurred by the mother of a handicapped child in order to provide the specific therapy program the defendant refused to provide. *Id.* at 61-62. There, the parent stepped in to learn and perform the duties of a trained service provider that the defendant was legally obligated to provide.[1]

Expenses are reimbursable so long as they were reasonably and foreseeably expended to secure for a

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[1] Ms. Blanchard's claim of damages for spending time at hearings and learning the law is similar to the claims of attorney parents seeking reimbursement for representing their children in due process hearings and petitions for review. Claims for reimbursement by parents, including attorney parents, for representing their disabled children in administrative hearings under the IDEA, have been rejected in other federal courts. *Woodside v. School District of Philadelphia Board of Education,* 248 F.3d 129, 131 (3rd Cir. Pa. 2001); *Doe v. Board of Education of Baltimore County,* 165 F.3d 260, 263 (4th Cir. 1998).

handicapped child, those services that defendants were legally obligated to provide. *See, e.g., Greater Los Angeles Council on Deafness, Inc. v. Zolin,* 812 F.2d 1103 (9th Cir. 1987). The court concludes that a suit for lost profits and for personal pain and suffering under the IDEA is not allowed.

B. Section 1983 Claim

To sustain a § 1983 action, the plaintiff must demonstrate that the federal statute upon which she relies creates an individually enforceable right in the class of beneficiaries to which she belongs. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). Even after this showing, "there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing v. Freestone,* 520 U.S. 329, 341, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). The defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right. *Id.* (*citing Smith v. Robinson,* 468 U.S. 992, 1012, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984)). "Evidence of congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983'". *Id.* (internal citations omitted).

The IDEA was enacted to ensure that children with disabilities have available to them a FAPE that emphasizes special education and related services

designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A); *Blanchard,* 420 F.3d at 920. While parents have procedural rights to participate with the team of educational professionals in the development of an IEP for their child and the opportunity to challenge decisions of the IEP team, they are not the real parties in interest. *See, e.g., Collinsgru v. Palmyra Board of Education,* 161 F.3d 225, 236 (3rd Cir. 1998).

Ms. Blanchard's participation in the educational process is dependent upon being the parent of a child receiving services covered by the IDEA. She has no individually enforceable right under the IDEA to support a claim for damages under § 1983.[2]

C. ADA and Rehabilitation Act Claims

Ms. Blanchard alleges violation of Section 504 of the Rehabilitation Act, 20 U.S.C. § 794(a) and the Americans with Disabilities Act, 42 U.S.C. § 12132 (Title II of the ADA). To prove a public service or program violates the ADA, a plaintiff must show that she is a "qualified individual" with a disability, excluded from participation or denied benefits by reason

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[2] The comprehensive enforcement scheme provided by the IDEA is also incompatible with enforcement through § 1983. *See, Smith v. Robinson,* 468 U.S. 992, 104 S.Ct. 3457 (1984); *Department of Education, State of Hawaii v. Katherine D.,* 727 F.2d 809 (9th Cir. 1983) (*cited with approval in Abrams v. City of Rancho Palos Verdes,* 354 F.3d 1094 (9th Cir. 2004) (*rev'd on other grounds in* 125 S.Ct. 1453.

of her disability. The same requirements must be met under Section 504.

Ms. Blanchard does not allege that she is a "qualified person with a disability" and there is no reason to believe that she can meet this definition. Additionally, Ms. Blanchard's claim of "reimbursement" is not for the type of expense she is legally allowed to pursue under the ADA and Rehabilitation Act. Ms. Blanchard's reliance on *Patricia N. v. Lemahieu,* 141 F.Supp.2d 1253 (D. Hawaii 2001) is unavailing. As noted above, the expenses claimed must have been reasonably and foreseeably expended to secure services that the defendant was legally obligated to provide but failed to provide.

D. Individual Liability

(1) Dismissal of Individuals for Failure of Service

On February 14, 2003, the court entered an order indicating that it would grant defendants' then outstanding motion to dismiss for insufficiency of process if the defendants were not served by March 14, 2003. Returns of service for Defendants Russ Davis and Robyn Goodwin were never filed. Accordingly, all claims against them are dismissed.

(2) Dismissal of Remaining Individual Defendants

Ms. Blanchard named two additional individual defendants in her complaint, former teacher Regine Alexsunas, and Jim Grossman, a speech and language specialist not employed the District. The District argues that these defendants may not be held individually liable under the ADA, Rehabilitation Act, IDEA, or § 1983, when these statutes are used as a basis for the § 1983 claim. The court agrees. Neither the ADA or Rehabilitation Act provide for liability against defendants sued in their individual capacity. *Miller v. King,* 384 F.3d 1248, 1277 (11th Cir. 2004); *Baublitz v. State of California,* 1998 WL 4274444 at 1 (N.D. Cal. 1998)). In addition, there is no individual liability for damages under the ADA and Rehabilitation Act when these statutes are used as the basis for a § 1983 claim. *Vinson v. Thomas,* 288 F.3d 1145, 1156 (9th Cir. 2002).

Finally, as money damages are not available for retrospective and non-educational injuries under the IDEA, *Blanchard,* 420 F.3d at 921, these same damages cannot be recovered from the individually named defendants as a matter of law.

V. Conclusion

For the reasons stated above, the court concludes that Ms. Blanchard's claims are not cognizable as a matter of law and must be dismissed.

ACCORDINGLY,

IT IS ORDERED:

(1) Defendants' motion for summary judgment (Dkt.#50) is **GRANTED** and Plaintiff's Complaint is dismissed with prejudice.

DATED this 20th day of April, 2006.

/s/ Franklin D. Burgess
FRANKLIN D. BURGESS
UNITED STATES
DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHERYL BLANCHARD,

Plaintiff-Appellant,

v.

MORTON SCHOOL DISTRICT; RUSS DAVIS; REGINE ALEKSUNAS, SE Teacher; JIM GROSSMAN, SLP; ROBYN GOODWIN, Principal,

Defendants-Appellees.

No. 03-35677

D.C. No. CV-02-05101-FDB

OPINION

Appeal from the United States District Court for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted
January 14, 2005 – Seattle, Washington

Filed August 19, 2005

Before: Mary M. Schroeder, Chief Judge, Alfred T. Goodwin and Susan P. Graber, Circuit Judges.

Opinion by Chief Judge Schroeder

COUNSEL

Lonnie Davis, Disabilities Law Project, Seattle, Washington, for the plaintiff-appellant.

Jocelyn J. Lyman, Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S., Olympia, Washington, for the defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

This is an action by the mother of a child with autism, who seeks damages for the mother's own emotional distress caused by the conduct of the defendants, the Morton School District and its current and former employees, in providing special education services to her son. The district court dismissed the action for failure to exhaust administrative remedies under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482. We reverse, because there were no administrative remedies available for her to exhaust. We remand to the district court to consider the merits of her claims.

Plaintiff Cheryl Blanchard's son is enrolled in a special education program provided by the Morton School District ("District"). Blanchard, pro se, represented her son in a series of administrative actions against the District, alleging that the District failed to accommodate him under the IDEA. In 2000, an administrative law judge concluded that the District had not properly implemented the student's individualized education plan and had denied the student a free appropriate public education as mandated by section 1415 of the IDEA. The administrative law judge ordered the District to implement the plan, and

provide compensatory education to the student for the District's past failings. The record indicates that Blanchard felt compelled to initiate four other hearings on behalf of her son between 2001 and 2003, aimed at implementing and modifying the plan.

In 2002, Blanchard filed this complaint pro se against the District and several of its current and former employees. Blanchard sought money damages pursuant to 42 U.S.C. § 1983 for alleged emotional distress caused by the conduct of the defendants in providing special education services to her son under the IDEA. Blanchard sought damages for her emotional distress due to the defendants' alleged "deliberate indifference and violation of rights," as well as reimbursement for the income she lost while pursuing her son's remedies under the IDEA.

The defendants moved to dismiss her claim pursuant to Federal Rule of Civil Procedure 12(b)(1). The district court appointed pro bono counsel for Blanchard. The district court later granted the defendants' motion to dismiss, concluding that Blanchard failed to exhaust her administrative remedies under the IDEA. Blanchard appeals through her pro bono counsel.

DISCUSSION

The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related service designed to meet their

unique needs." 20 U.S.C. § 1400(d)(1)(A). The IDEA sets out a comprehensive educational scheme that confers on disabled students a substantive right to public education. *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992). Under the IDEA, state or local educational agencies can receive federal funding to assist them in educating disabled children. To receive the funding, state and local educational agencies must ensure that children with disabilities – and their parents – are guaranteed specified procedural safeguards with regard to the provision of free appropriate public education by the agencies. 20 U.S.C. § 1415(a).

The IDEA does not restrict or limit the rights of disabled students or their parents under other statutes. The IDEA requires, however, that "before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) [due process hearing] and (g) [appeal] of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. § 1415(1). If a plaintiff is required to exhaust administrative remedies but fails to do so, the federal courts do not have jurisdiction to hear the plaintiff's claim. *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1274 (9th Cir. 1999). (The policy behind the exhaustion requirement is to ensure that educational agencies have the first opportunities to remedy shortcomings in their educational programs for disabled students. *See Hoeft*, 967 F.2d at 1303; *see also Christopher S. v.*

Stanislaus County Office of Educ., 384 F.3d 1205, 1209 (9th Cir. 2004). Relief under the IDEA therefore must be appropriate in light of the primary purpose of the IDEA. *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985). Relief is available under the IDEA when "[b]oth the genesis and the manifestations of the problem are educational." *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 993 (7th Cir. 1996); *see also Robb v. Bethel Sch. Dist. #403*, 308 F.3d 1047, 1052 (9th Cir. 2002). At the same time, courts have recognized that the IDEA's administrative remedies cannot compensate for a plaintiff's injuries that are completely non-educational. *Padilla v. Sch. Dist. No. 1 of Denver*, 233 F.3d 1268, 1274 (10th Cir. 2000).

Thus, under the relevant statute, exhaustion of administrative remedies is required when a plaintiff is seeking "relief that is also available under" the IDEA. 20 U.S.C. § 1415(1). Blanchard argues that the district court erred in concluding that she failed to exhaust required administrative remedies before filing this suit. Blanchard did not pursue administrative remedies on her own behalf before filing suit. The issue in this appeal therefore is whether Blanchard was seeking "relief that is also available under" the IDEA, so that exhaustion was required.

For purposes of exhaustion, "relief that is also available under" the IDEA does not necessarily mean relief that fully satisfies the aggrieved party. Rather, it means "relief suitable to remedy the wrong done the plaintiff, which may not always be relief in the

precise form the plaintiff prefers." *Robb,* 308 F.3d at 1049. But there must be some relief available.

Blanchard's complaint sought money damages for emotional distress and for lost wages caused by the District's alleged deliberate indifference toward her son's IDEA claims and the District's alleged violations of the IDEA. Money damages for retrospective and non-educational injuries are not available under the IDEA. *See Witte,* 197 F.3d at 1275; *see also Polera v. Bd. of Educ. of the Newburgh Enlarged City Sch. Dist.,* 288 F.3d 478, 486 (2d Cir. 2002); *Charlie F.,* 98 F.3d at 991; *Hall v. Knott County Bd. of Educ.,* 941 F.2d 402, 407 (6th Cir. 1991). That alone is not dispositive, for a plaintiff cannot avoid the IDEA's exhaustion requirement simply by limiting a prayer for relief to money or services that are not provided under the IDEA. *Robb,* 308 F.3d at 1049. The dispositive question therefore is whether Blanchard is seeking remedy for injuries that could be redressed to any degree by the IDEA's administrative procedures. *Id.* at 1050.

The remedies available under the IDEA include educational services for disabled children. *See* 20 U.S.C. §§ 1400-1482. They do not provide an adequate remedy for Blanchard.

We held in *Witte* that a plaintiff seeking monetary relief for alleged past physical and emotional abuse by school staff was not required to exhaust administrative remedies under the IDEA. 197 F.3d at 1276. We emphasized that "all educational issues already have been resolved to the parties' mutual

satisfaction through the [administrative] process." *Id.* at 1275. That is true here, as well. Following *Witte,* we hold that Blanchard had no remedies under the IDEA to exhaust. Blanchard has resolved the educational issues implicated by her son's disability and has obtained the educational relief available under the IDEA on behalf of her son.

The District relies on *Robb.* In that case, a student with cerebral palsy and her parents sought damages for lost educational opportunities, emotional distress, humiliation, embarrassment, and psychological injury after the student was removed from the classroom for extended tutoring. *Robb,* 308 F.3d at 1048. We held that because these injuries could be remedied to some degree by the IDEA's administrative procedures and remedies, the plaintiffs must exhaust those administrative remedies before filing suit. *Id.* at 1054. We stated: "Where, as here, a plaintiff's injuries are part and parcel of the educational process, we must give the local administrators the first opportunity to remedy them." *Id.* at 1053 n.4. In this case, however, Blanchard's emotional distress injuries and lost income could not be remedied through the educational remedies available under the IDEA. *See Witte,* 197 F.3d at 1275.

The District also stresses that the IDEA requires school districts to provide "related services" to education, including "psychological services, . . . social work services, [and] counseling services, . . . as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A). *See*

Robb, 308 F.3d at 1050. The regulations implementing the statute provide that the required psychological services may include "[p]lanning and managing a program of psychological services, including psychological counseling for children and parents." 34 C.F.R. § 300.24(b)(9)(v). The act thus has some provision for counseling parents, but only with respect to assisting the child. *See* 20 U.S.C. § 1401(26)(A). The psychological services available under the IDEA would not provide a remedy for Blanchard's own claims of emotional injury.

We emphasize that our holding is a narrow one: that there is no procedural barrier to Blanchard's claim that the defendants' acts (as distinct from her child's disability) have caused her to incur damages for emotional distress. In the present posture of the case we are not called on to decide whether Blanchard's claim is, substantively, cognizable under federal law nor, even if so, whether her claim is meritorious. We hold only that, because the IDEA provides no remedy for Blanchard, she need not exhaust administrative remedies before filing suit. We therefore reverse the district court's dismissal of Blanchard's complaint and remand the case for further proceedings.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHERYL BLANCHARD, Plaintiff, v. MORTON SCHOOL DISTRICT, RUSS DAVIS, Superintendant, REGINE ALEKSUNAS, SE Teacher, JIM GROSSMAN, SLP, ROBYN GOODWIN, Principal, Defendants.	Case No. CO2-5101 FDB ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (Filed Aug. 13, 2003)

Plaintiff filed this case in an attempt to recover monetary compensation pursuant to 42 U.S.C. § 1983 for alleged emotional distress resulting from conduct by the defendants in providing special education services to her son. As a basis of her § 1983 action, she claims that she has been denied rights secured by the Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1415. Defendants move to dismiss the claims of plaintiff pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. The Court has carefully reviewed all documents filed in this matter and finds that defendants' Motion to Dismiss should be **GRANTED**.

The record reflects that plaintiff represented her son *pro se* in *In the Matter of Morton School District,* Special Education Cause No. 00-37. The

Administrative Law Judge reviewing the matter concluded that the Morton School District had denied plaintiff's son a Free Appropriate Public Education (FAPE) in violation of the IDEA. Subsequent to this decision, plaintiff requested a subsequent due process hearing. The matter was assigned Cause No. 2001-SE-0078 and was ultimately dismissed upon plaintiff's request. The record also reveals that plaintiff initiated three other due process hearings involving the Morton School District under Cause Nos. 2002-SE-0049, 2001-SE-0033, and 2003-SE-0030.

Plaintiff makes light of the rule barring plaintiffs from pursuing a judicial remedy before they exhaust their administrative remedies under the IDEA. *See Robb v. Bethel School District*, 398 F.3d 1050 (9th Cir. 2002). The Ninth Circuit in *Robb* decided that even where the IDEA's ability to remedy a particular injury is unclear, exhaustion is required to give educational agencies an initial opportunity to ascertain and alleviate the alleged problem. *Id.* at 1050. The relief available to plaintiffs may not always be in the precise form that they prefer. *Id.* at 1049.

A careful review of the record reveals that plaintiff failed to exhaust her claims relating to emotional distress. Consequently, defendants were never afforded the opportunity to remedy her claims despite the fact that defendants concede that "[a] remedy was potentially available to her in an administrative forum." Defs. Supp. Reply at 2. To proceed in District Court, exhaustion of these issues is required. An alternative argument simply remains unsupported.

As such, the Court finds that plaintiff has failed to meet of [sic] her burden of establishing subject matter jurisdiction.

ACCORDINGLY;

IT IS HEREBY ORDERED:

(1) Defendants' Motion to Dismiss (Dkt. #11) is **GRANTED**;

(2) Defendants' Motion to Strike Plaintiff's Unauthorized Surreply Documents (Dkt. #18) is **STRICKEN** from the Court's Calendar as **MOOT**;

(3) The Clerk of the Court is directed to send copies of this Order to counsel for plaintiff and defendants.

DATED this 18th day of July, 2003.

FRANKLIN D. BURGESS
UNITED STATES
DISTRICT JUDGE

(2)

No. 07-825

Supreme Court, U.S.
FILED
JAN 18 2008
OFFICE OF THE CLERK

81

In The

Supreme Court of the United States

CHERYL BLANCHARD,

Petitioner,

v.

MORTON SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Does 42 U.S.C. §1983 provide a cause of action for damages to compensate a parent for her *pro se* participation in a due process hearing under the Individuals with Disabilities Act?

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STATEMENT OF THE CASE

I. OVERVIEW OF THE PROCEEDINGS BELOW

The Respondent Morton School District is a small district located in a rural community in southwest Washington. The District serves approximately four hundred students.

The Petition arises from Cheryl Blanchard's disagreement with the December 3, 2007 decision of the Ninth Circuit Court of Appeals affirming the district court's order granting summary judgment of dismissal of her case.[1]

In her district court complaint, Blanchard requested damages under 42 U.S.C. §1983 for emotional distress and loss of profits incurred from a home based business during the time she participated in an administrative hearing under the Individuals with Disabilities Education Act ("IDEA") concerning her son's educational program. E.R. 9. Because Blanchard did not appeal the district court's dismissal of her emotional distress claim, the Ninth Circuit concluded that the claim was waived. App. 9. Blanchard's claim for lost profits was the only damages claim remaining in the case when decided below,

---

[1] Individual defendants Russ Davis, Regine Alexsunas, Jim Grossman and Robyn Goodwyn were dismissed with prejudice by the district court. App. 17-18. Blanchard did not appeal dismissal of these individuals to the Ninth Circuit, and they are no longer parties to the case.

and it is the only issue encompassed by the Petition now before the Court.

Blanchard's damages claim relates to her participation in an IDEA due process hearing that took place in April 2000, concerning the 1999-2000 school year. E.R. 135. The hearing, conducted by an administrative law judge (ALJ), was convened to address Blanchard's concerns about the District's implementation of the Individual Education Program (IEP) in effect for her son when he was in the first grade. E.R. 4-9, 27. The ALJ focused on Blanchard's concern that the District had not used a specific teaching methodology known as Applied Behavior Analysis with her son and that data relating to his progress at school was lacking. E.R. 27.

The ALJ decided in Blanchard's favor at the conclusion of the hearing, and ordered the District to provide additional training for staff and compensatory education for her son before the beginning of the next school year. E.R. 55-56.

II. OVERVIEW OF RELATED PROCEEDINGS

Blanchard states in her Petition that the case below followed "years of administrative proceedings against the District," implying that the District repeatedly denied proper educational services to her son. [Petition at 5]. In fact however, the issues in the complaint spanned only the time between October 1999 and April 2002. E.R. 1-9. During that period, Blanchard obtained only one favorable decision, that

being the decision following the due process hearing in April 2000, described above.

With respect to other due process hearings described below, Blanchard either abandoned her request for a hearing, or the ALJ ordered that the District provide only a portion of what Blanchard requested, or the ALJ denied relief to Blanchard and decided in favor of the District.

Spring 2001 due process hearing. Blanchard requested a hearing concerning Extended School Year (ESY) services because she disagreed with the District's proposal to provide eight weeks of services for her son during the upcoming summer break. The ALJ decided in favor of the District, concluding that its proposal for ESY services was acceptable and met IDEA standards. E.R. 116.

June 2001 due process hearing. Blanchard requested a hearing concerning implementation of her son's IEP for the preceding school year and other issues. E.R. 120-21. After the ALJ dismissed some of the claims on summary judgment, Blanchard canceled her hearing request and did not respond to the ALJ's request for clarification. The ALJ dismissed the proceeding without a hearing on October 29, 2001. E.R. 123-26.

April 2002 due process hearing. Blanchard requested a hearing because she wanted more ESY services for her son during the upcoming summer break than the District offered to provide. E.R. 59, 60. The ALJ did not adopt either Blanchard's or the

District's proposal, and ruled that services should be provided at a rate of three hours per day, four days per week, for a period of eight weeks during the summer break. E.R. 68.

Spring 2003 due process hearing. Blanchard again requested a hearing concerning the District's ESY proposal for the upcoming summer months. The hearing did not occur because Blanchard and the District reached an agreement concerning the extent of services to be provided. E.R. 107.

March 2006 due process hearing. Blanchard requested a hearing concerning the District's implementation of her son's IEP, training of staff, and other issues relating to the 2005-2006 school year. After the ALJ decided in favor of the District on all issues, Blanchard filed a second complaint in district court entirely separate from the complaint in this case.

In the second district court case filed in 2006, Blanchard again requested an award of damages and fees for her *pro se* representation under 42 U.S.C. §1983 and §1988 even though she was not the prevailing party at the underlying due process hearing. The district court dismissed the complaint and Blanchard appealed. On December 26, 2007, the Ninth Circuit affirmed dismissal of Blanchard's §1983 and §1988 claims, and reversed the dismissal of other claims in an unpublished opinion dealing only with

that case.[2] The case is currently pending in district court.

REASONS TO DENY THE PETITION

I. THE QUESTION RAISED DOES NOT INVOLVE A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE

Throughout this case, Blanchard has requested damages under 42 U.S.C. §1983 as compensation for the profits claimed to be lost from a home based business due to the time she spent preparing for and participating in the April 2000 due process hearing. This request is not properly viewed as a claim for damages at all, as it is essentially a request for a fee based on Blanchard's *pro se* representation during the IDEA administrative process.

This fee request, disguised as a request for damages, does not represent a recurring issue of substantial importance warranting the Court's review. To the contrary, the answer to this issue is determined by the universally accepted rule that a *pro se* plaintiff is not entitled to an award of fees.

The Ninth Circuit characterized Blanchard's damages claim as a request for compensation for

[2] *Blanchard, et al. v. Morton School District, et al.*, 2006 WL 2459167 (W.D. Wash., Aug. 25, 2006), *aff'd in part, rev. in part*, 2007 WL 4533472 (Dec. 26, 2007).

acting as her own lawyer. Relying upon the decision in *Kay v. Ehler*, 499 U.S. 432 (1991),[3] the court decided against Blanchard, explaining that a *pro se* plaintiff is not entitled to an award of attorneys' fees. App. 9.

Blanchard argues that the Ninth Circuit decision is an incentive for parents to hire attorneys to provide representation for their children in IDEA proceedings. [Petition at 20]. Assuming this is so, this incentive is one specifically intended by the Supreme Court. As explained in *Kay*:

> A rule that authorizes awards of counsel fees to *pro se* litigants – even if limited to those who are members of the bar – would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

499 U.S. at 438. This reasoning has been followed by the circuit courts that have addressed the issue of fees for parents who proceed *pro se* in IDEA proceedings. In *Doe v. Board of Education*, 165 F.3d 260 (4th Cir. 1998), the court explained:

---

[3] In *Kay v. Ehler*, the *pro se* plaintiff that requested an award of fees under §1988 was a licensed attorney.

> (T)he central trust of *Kay* is that fee-shifting statutes are meant to encourage the effective prosecution of meritorious claims, and that they seek to achieve this purpose by encouraging parties to obtain independent representation. Like attorneys appearing *pro se*, attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that "reason, rather than emotion" will dictate the conduct of the litigation.
>
> . . .
>
> Precisely because disabled children deserve independent legal services, the IDEA fee-shifting provision should be read to encourage parents to obtain independent legal services.

Id. at 263-64. All circuit courts deciding this issue are in accord.

In *Woodside v. School Dist. of Philadelphia Bd. of Educ.*, 248 F.3d 129 (4th Cir. 2001) the court denied a *pro se* parent's fee request, noting that the danger of inadequate representation is as great when an emotionally charged parent represents his minor child as when the parent represents himself. *Id.* at 131.

In *S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601 (2d Cir. 2006), the court affirmed dismissal of an attorney-parent's fee request following a settlement reached after conclusion of a due process hearing. The court recognized the risk that a parent-attorney lacks sufficient emotional detachment to

provide effective representation is a risk which is "undeniably present in disputes arising under the IDEA." *Id.* at 603.

Concluding that the fee shifting provision in 42 U.S.C. §1988 is nearly identical to that contained in the IDEA, the Ninth Circuit follows the Second, Third and Fourth Circuits to hold that fees are not available to parents, who are also attorneys, for their representation in IDEA proceedings. *Ford v. Long Beach Uni. Sch. Dist.*, 461 F.3d 1087 (9th Cir. 2006); *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811 (9th Cir. 2007) [court awarded fees for work done by retained counsel during a successful administrative proceeding, but not for the attorney-parent who also participated in that proceeding].

When Blanchard's claim for damages is viewed for what it is – a request for compensation based on *pro se* representation during the IDEA administrative process – it does not qualify as a recurring issue of substantial importance warranting review by the Court.

II. THE INSUBSTANTIAL CIRCUIT SPLIT DOES NOT WARRANT REVIEW

A. Supreme Court precedent provides direction for courts to conclude that 42 U.S.C. §1983 does not provide a remedy for violations of the Individuals With Disabilities Education Act (IDEA).

The Court's decisions in *Smith v. Robinson*, 468 U.S. 992 (1984) and *City of Rancho Palos Verdes v.*

Abrams, 544 U.S. 113 (2005) provide the definitive analysis for courts to apply when determining whether a violation of a federal statutory right can be remedied through §1983. Given this clear guidance, there is no need for the Court to resolve what is only an illusory circuit split.

In *Smith v. Robinson*, the Court addressed whether parents were entitled to recover attorneys' fees under 42 U.S.C. §1988 for their successful efforts challenging the school district's decision to withdraw funding for their child's private educational program. At the time, the predecessor to the IDEA, the Education of the Handicapped Act (EHA)[4] did not include an attorneys' fee provision. *Id.* at 995. As a result, the parents' claim for attorneys' fees was based on constitutional equal protection and due process grounds, and not on the IDEA itself. *Id.* at 1008-1009.

In reaching its decision that an award of attorneys' fees was not available to the parents through a constitutional challenge that was virtually identical to the IDEA claim, the Court in *Smith* concluded that the comprehensive remedy provided by the IDEA precludes a fee award through an ancillary action

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[4] The IDEA was first named the Education for all Handicapped Children Act (EHACA). In 1990, Congress renamed the EAHCA as the Education for Handicapped Act (EHA). Since 1990, the act has been named the Individuals with Disabilities Education Act (IDEA). To be consistent with Blanchard's method of referring to this legislation, the EAHCA and the EHA will be referred to as the IDEA throughout this response.

under §1983. The Court noted with approval that courts in the Second, Seventh and Ninth Circuits[5] had already reached a similar conclusion. *Id.*, n.11.

After *Smith* was decided, Congress responded to its specific holding concerning attorneys' fees and amended the IDEA in 1986 to include a provision allowing for an award of fees. *See* 20 U.S.C. §1415(e)(4)(B). This provision permits awards of attorneys' fees to prevailing parties under the IDEA itself,[6] without the need to assert a claim under §1983.

The 1986 amendments to the IDEA also added a savings clause to clarify that the right to pursue *constitutional* claims is not limited by the IDEA. 20 U.S.C. §1415(f) [now §1415(l)]. With several changes of no significance here, the clause now states in relevant part:

> Nothing in this title . . . shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, Title V of the Rehabilitation Act of 1973 [ ],

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[5] *Quackenbush v. Johnson City School District*, 716 F.2d 141 (2d Cir. 1983); *Department of Education of Hawaii v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983); *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981).

[6] The current version of the IDEA authorizes the district court to award reasonable attorneys' fees as part of the costs to a parent who is the prevailing party, and also against the parent, or the attorney for the parent in specific circumstances as set forth in the statute. 20 U.S.C. §1415(i)(3)(B).

> or other Federal laws protecting the rights of children with disabilities . . .

The IDEA savings clause makes no reference whatsoever to §1983, and cannot be read to allow an IDEA based statutory claim to be pursued through §1983. Nor does the savings clause overrule the Court's explanation in *Smith v. Robinson*, 468 U.S. 992, relating to the analysis to be applied when determining whether a statutory violation can be the basis of a §1983 claim.

In 2005, the Court decided *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113. The decision provides detailed clarification as to when a statutory right can provide the basis for a §1983 claim. With specific reliance on its earlier decision in *Smith v. Robinson*, the Court explained:

> The existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under Section 1983 and those in which we have held it would not.
>
> . . .
>
> (I)n all of the cases in which we have held that §1983 is available for a violation of a federal statute, we have emphasized that the statute at issue, in contrast to those in *Sea*

> *Clammers*[7] and *Smith*, did not provide a private judicial remedy (or in most cases, even a private administrative remedy) for the rights violated.
>
> . . .
>
> *Sea Clammers* and *Smith* adopt the . . . assumption . . . that limitations upon the remedy contained in the statute are deliberate and are not to be evaded through Section 1983.

Id., 544 U.S. at 121-24 [internal text and citations omitted].

Accordingly, federal courts have been provided a clear and specific methodology to apply to the question of whether a federal statute confers rights that may be enforced through an action under 42 U.S.C. §1983. Notably, the Ninth Circuit decision below, and every other circuit court applying the methodology described in *Rancho Palos Verdes*, have reached the same conclusion: §1983 is not available as a damages remedy for claims based on asserted violations of the IDEA.

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[7] *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981).

B. All circuit courts deciding the issue conclude that the IDEA does not provide a damages remedy as part of its comprehensive enforcement scheme.

The IDEA provides timely access to an administrative hearing process – referred to in the IDEA as an "impartial due process hearing" – for parents to present complaints with respect to any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education for their child. 20 U.S.C. §1415(f).

Should parents disagree with the outcome of a due process hearing, they are entitled to bring a civil action with respect to their complaint in district court, without regard to the amount in controversy. 20 U.S.C. §1415(i)(2)(A). Prompt resolution of the complaint is encouraged, as the district court case is to be initiated within ninety (90) days of the administrative hearing officer's decision. 20 U.S.C. §1415(i)(2)(B). The district court is authorized to grant appropriate relief, including an award of reasonable attorneys' fees to parents if they are determined to be the prevailing party. 20 U.S.C. §1415(i)(3)(B)(i).

The IDEA provides a comprehensive remedial and enforcement scheme for violations of its provisions, but it is silent concerning the availability of a damage remedy. This distinction is recognized by the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, and all of these circuits

have concluded that a damages award is not available under the IDEA.

Circuit courts deciding this issue during the last five years include *Blanchard v. Morton School District*, 420 F.2d 918, 921 (9th Cir. 2005) ["money damages for retrospective and non-educational injuries are not available under the IDEA];[8] *Ortega v. Bibb County School District*, 397 F.3d 1321, 1325 (11th Cir. 2005) [damages are inconsistent with IDEA's statutory scheme]; *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 124 (1st Cir. 2003) ["tort-like money damages, as opposed to compensatory equitable relief, are not available under IDEA"]; *Polera v. Board of Education*, 288 F.3d 478, 486 (2d Cir. 2002) ["the purpose of the IDEA is to provide educational services, not compensation for personal injury, and a damages remedy – as contrasted with reimbursement of expenses – is fundamentally inconsistent with that goal."]

Circuit courts deciding this issue more than five years, but less than fifteen years ago include *Sellers ex rel. Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 527 (4th Cir. 1998) ["tort-like damages are simply

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[8] This is the decision in Blanchard's first appeal to the Ninth Circuit in this case, referred to as *Blanchard I* in the Petition. The court reversed the district court's dismissal on exhaustion of remedy grounds and remanded the case. The Petition arises from the Ninth Circuit's decision following her second appeal.

inconsistent with IDEA's statutory scheme"]; *Charlie F. v. Board of Education of Skokie School Dist.*, 98 F.3d 989, 991 (7th Cir. 1996) ["the structure of the statute – with its elaborate provision for education services and payments to those who deliver them – is inconsistent with monetary awards to children and parents; damages are not relief that is available under the IDEA"]; *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996) [general and punitive damages for the types of injuries alleged by plaintiffs are not available under the IDEA]; *Crocker v. Tennessee Secondary Sch. Athletic Assoc.*, 980 F.2d 382, 386 (6th Cir. 1992) [no recovery of general damages under the IDEA].

Circuit courts deciding this issue more than fifteen years ago include *Hall v. Knott Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991) [no right to recover damages for a student's loss of earning power attributed to a school board's failure to provide appropriate education]; *Marvin H. v. Austin School District*, 714 F.2d 1348, 1356 (5th Cir. 1983) [relief under the IDEA generally includes only prospective relief and a damage remedy is not generally consistent with the goals of the statute].

All circuit courts considering the issue have uniformly concluded that the comprehensive enforcement and remedial scheme of the IDEA does not allow for an award of damages.

C. The clear trend in the circuit courts is to conclude that §1983 does not provide a damages remedy for a violation of the IDEA.

Given the complete unanimity among the circuit courts deciding that damages are not available in a direct action under the IDEA, it is a short step for all courts to eventually conclude that this limitation in the IDEA cannot be circumvented through resort to a damages claim under 42 U.S.C. §1983.

In *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007) (en banc), the Third Circuit decided that the comprehensive enforcement scheme of the IDEA precludes enforcement of its provisions through an action under §1983. *Id.* at 803. The court was guided by the Supreme Court's methodology described in *Rancho Palos Verdes*, 544 U.S. 113, to abrogate its earlier decision in *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995), where the court previously decided that §1983 was available to redress rights secured by the IDEA.

In *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. 2006), the First Circuit rejected resort to §1983 to evade the limited remedial structure of the IDEA. The Court noted that allowing a plaintiff to claim money damages under §1983 would "subvert the overall scheme that Congress envisioned for dealing with educational disabilities, as well as the purpose of the IDEA, which is to ensure a free appropriate public education." *Id.* at 29.

In *Padilla ex. rel. Padilla v. Sch. Dist. No. 1, Denver*, 233 F.3d 1268 (10th Cir. 2000), the Tenth Circuit decided that a cause of action under §1983 is not available to remedy IDEA violations, noting that the Supreme Court has cited the IDEA as an example of an exhaustive legislative enforcement scheme that precludes resort to §1983. The Tenth Circuit recognized that the Court considers the decision in *Smith v. Robinson*, 466 U.S. 992, to be "alive and well insofar as it asserts that §1983 claims may not be used to remedy IDEA violations." *Id.* at 1274.

In *Sellers ex rel. Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524 (4th Cir. 1998), the court noted that the Supreme Court has never approved an award of compensatory or punitive damages under the IDEA for a violation of its terms. Noting that tort-like damages are simply inconsistent with IDEA's statutory scheme, the Fourth Circuit explained that the purpose of the IDEA's procedural mechanisms is to preserve the right to a free appropriate public education, not to provide a forum for tort-like claims of educational malpractice. The court stated that under *Smith v. Robinson,* 468 U.S. 992, the parents "undoubtedly would be precluded from circumventing IDEA's limits on remedial relief by suing instead under §1983." *Id.* at 530.

In *Crocker v. Tennessee Secondary Sch. Athletic Assoc.*, 980 F.2d 382, 387 (6th Cir. 1992), the Sixth Circuit reached the same conclusion that §1983 is not available to provide a damages remedy for a violation of rights secured by the IDEA, although it made that

decision without reference to the underlying analysis it used.

In *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), even before the decision in *Smith v. Robinson*, the Seventh Circuit rejected a claim that an IDEA based complaint was cognizable under §1983. The court explained that the IDEA provided a detailed statutory administrative and judicial scheme for enforcement of its provisions but did not include a traditional damages remedy, thereby precluding resort to §1983 as a "conduit to attorneys' fees" under §1988. *Id.* at 1217.

In recent months, district courts have followed the majority view. In the Eleventh Circuit, where the issue has not yet been decided by the Court of Appeals, a district court followed the majority to conclude that a claim based on a violation of the IDEA cannot be remedied through §1983. *Sammons v. Polk County School Board*, 2007 WL 4358266 (M.D. Fla. 2007). In the Fifth Circuit, a district court relied on the majority view to reach the same result. *S.D. by D.B. v. Houston Independent School District*, 2007 WL 2947443 (S.D. Tex. 2007).

The clear trend in the lower federal courts is to adopt the majority view that a damages claim under §1983 is not available or a claimed violation of the IDEA.

D. Circuit courts deciding that §1983 provides a remedy for a violation of the IDEA are in the clear minority.

The decisions Blanchard relies on to argue that a reviewable circuit split exists have decided that §1983 is available as a remedy without consideration of the Court's refined analysis concerning when a federal statutory violation can be remedied through §1983, or they are distinguishable in other respects.

In *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2d Cir. 1987), the Second Circuit considered a parents' claim that the State Board of Education did not provide adequate complaint procedures or access to due process hearings where they could pursue complaints concerning system-wide violations of the IDEA. The case did not include a damages claim based on an IDEA violation, as the parents sought only declaratory and injunctive relief through §1983. The court concluded only that the parents were entitled to pursue a §1983 claim for the declaratory and injunctive relief they sought in that case.

Fifteen years after the decision in *Mrs. W. v. Tirozzi*, the Second Circuit decided *Polera v. Board of Education*, 288 F.3d 478 (2d Cir. 2002). In *Polera*, the court differentiated between equitable relief that is available under the IDEA, and damages that are not. *Id.* at 486. Now that the Second Circuit has joined the majority of circuits to hold that IDEA's comprehensive remedies do not include a damages remedy, it is likely that the court will ultimately

follow the majority and decide that §1983 is not available to pursue a damages claim under §1983 for violations of the IDEA.

Blanchard also relies on the Second Circuit decision in *Weixel v. Board of Educ. of City of New York*, 287 F.3d 138 (2d Cir. 2002). *Weixel* was decided on March 29, 2002, one month before the Second Circuit decided *Polera*, 288 F.3d 478. Without the benefit of the analysis in that case, the court in *Weixel* summarily concluded that the district court erred in dismissing a §1983 claim on a motion to dismiss under Fed. R. Civ. P. 12(b)(6). While further proceedings in *Weixel* are not reported, the outcome of the case would surely have been persuaded by the Second Circuit's decision in *Polera* that an award of damages is not available under the IDEA.

Furthermore, the Second Circuit has already applied the refined methodology explained in *Rancho Palos Verdes*, 544 U.S. 113, in a case concerning the availability of §1983 to remedy a statutory violation in a different context. In *Morris-Hayes v. Board of Education of the Chester Union Free School District*, 423 F.3d 153 (2d Cir. 2005), the court decided that the comprehensive remedies provided by the Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. §4311 *et seq.* ("USERRA") preclude a §1983 claim for damages against individual defendants, a remedy not authorized by USERRA. Given the Second Circuit's recognition of the methodology to apply to claims for damages under §1983 based on a federal statutory right, it is likely that the court will

ultimately conclude that §1983 is not available for such claims under the IDEA.

In *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997), the Seventh Circuit determined that §1983 was available to provide a basis for parents to pursue declaratory and injunctive relief to require state officials to bring Illinois into compliance with the mandates of the IDEA. Like the Second Circuit in *Mrs. W. v. Tirozzi*, the court did not address the issue of availability of damages under §1983 for violations of the IDEA. Significantly, *Marie O.* did not overrule the Seventh Circuit's earlier decision in *Anderson v. Thompson*, 658 F.2d 1205, where the court concluded that the IDEA did not include a damages remedy, thereby precluding resort to §1983 as a "conduit to attorneys' fees" under §1988. *Id.* at 1217.

The Fifth Circuit decision in *Angela L. v. Pasadena Independent School District*, 918 F.2d 1188 (5th Cir. 1990), cited by Blanchard, is not instructive. In a footnote, the court stated without discussion that parents can assert violations of §1983, *id.* at 1193, n.3, and affirmed an award of attorneys' fees to parents following a due process hearing.[9] Significantly, a district court in the Fifth Circuit acknowledged within the last year that courts have

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[9] Blanchard also cites to an unpublished decision in *Pace v. Bogalusa City Sch. Bd.*, 2001 WL 969103 (E.D. La. 2001), *aff'd in part on other grounds*, 403 F.3d 272 (5th Cir. 1983). The Fifth Circuit did not consider the §1983 claim because it was not briefed on appeal. *Id.* at 275.

determined that §1983 liability *cannot* be predicated on violations of the IDEA, and dismissed a §1983 claim on that basis. *S.D. by D.B. v. Houston Independent School District*, 2007 WL 2947443 (S.D. Tex. 2007).

In *Gean v. Hattaway*, 330 F.3d 758 (6th Cir. 2003), cited by Blanchard, the Sixth Circuit did not decide that §1983 provides a cause of action for damages under the IDEA. The court noted that the plaintiffs' claim was *not* a claim for general damages, but a claim for relief available under the IDEA, and the court required the plaintiffs to use the IDEA's prescribed administrative process before bringing such claims to court.

The Second, Fifth, Sixth and Seventh Circuit decisions referred to above either did not address the issue raised in the Petition, or they pre-date the decision in *Rancho Palos Verdes*, 544 U.S. 113. These decisions did not take into account the Court's explanation that a damages remedy under §1983 is not available for a federal statutory violation when the statute, like the IDEA, provides a comprehensive enforcement for violation of its terms.

None of the decisions relied upon by Blanchard provide a definitive analysis supporting a damages remedy under §1983 for an IDEA violation. Nor did any of those cases specifically decide the legal issue raised by the Petition – are damages available under §1983 for asserted violations of the IDEA?

III. THERE IS NO WIDELY RECOGNIZED CIRCUIT CONFLICT.

Six circuit courts and numerous district courts now conclude that §1983 is not available to provide a damages remedy for IDEA violations. These courts have, generally applied the methodology explained in *Smith v. Robinson*, 468 U.S. 992 (1984), as refined in *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). When courts use the required methodology, as they all must, they uniformly conclude that §1983 is not available to provide a damages remedy for an IDEA violation. The circuit courts deciding differently have not yet had the opportunity to apply this methodology. Thus, it cannot be said that a true circuit split exists at this time.

A closer look at decisions cited by Blanchard further illustrates this point. Four of the five district court decisions she cites to were decided prior to 2001, before the decision in *Rancho Palos Verdes,* and without its guidance concerning the methodology to apply when determining whether a statutory violation can be the basis of a §1983 claim.[10] At the time of those district court decisions, only the Fourth, Seventh and Tenth Circuits had determined that IDEA

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[10] *Goleta Union Elem. Sch. Dist. v. Ordway*, 166 F. Supp.2d 1287 (C.D. Cal. 2001); *M.H. v. Bristol Board of Education*, 169 F. Supp.2d 21 (D. Conn. 2001); *Zearly v. Ackerman*, 116 F. Supp.2d 109 (D.D.C. 2000); *Andrew S. ex rel. Margaret S. v. Sch. Comm. of Greenfield*, 59 F. Supp.2d 237 (D. Mass. 1999). [Petition at 18-20].

based rights did not provide the basis for a damages claim under §1983. *Sellers*, 141 F.3d 524; *Anderson*, 658 F.2d 1205; *Padilla*, 233 F.3d 1268. Now, the First, Third and Ninth Circuits have reached the same conclusion. *Diaz-Fonseca*, 451 F.3d 13; *A.W. v. Jersey City.*, 486 F.3d 791; *Blanchard v. Morton School District*. App. 1.

The remaining district court decision cited by Blanchard on this issue, *Carney ex rel. Carney v. Nevada ex rel. Department of Education*, 2007 WL 777697 (D. Nev. Mar. 12, 2007), *clarified on other grounds*, 2007 WL 3256573 (D. Nev. Oct. 31, 2007), concluded §1983 was *not* available to provide a damages remedy even when the parties had not addressed the issue in their briefs. The court found persuasive the reasoning in *Alex G. v. Board of Trustees of Davis Joint Unified Sch. Dist.*, 332 F. Supp.2d 1315, 1319 (E.D. Cal. 2004), where the court concluded that the comprehensive enforcement scheme in the IDEA, directed at resolution of complaints, is incompatible with enforcement through §1983. Both *Carney* (decided in Nevada) and *Alex G.* (decided in California) arose in states within the Ninth Circuit, and were decided before the Ninth Circuit decision below. This demonstrates that the trend is clearly toward a uniform conclusion in the federal courts that §1983 is not available to provide a damages remedy for claims arising under the IDEA.

CONCLUSION

The Petitioner has not established the grounds for this Court to grant the Petition. The Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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In The Supreme Court of the United States

CHERYL BLANCHARD,

Petitioner,

v.

MORTON SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I. THE EXISTENCE OF AN INTER-CIRCUIT CONFLICT REGARDING THE QUESTION PRESENTED IS NOT DISPUTED.

The Question Presented is whether 42 U.S.C. § 1983 provides a cause of action to enforce the rights in the IDEA. Respondents acknowledge that several courts of appeals hold § 1983 does create such a cause of action. "Circuit courts deciding that § 1983 provides a remedy for a violation of the IDEA are in the clear minority." Brief in Opposition ("Opp'n") 19. Respondents correctly note that currently a majority of the circuits to reach this issue have concluded, to the contrary, that § 1983 does not provide such a cause of action. *Id.* at 18, 20.

Respondents nonetheless suggest that this Court should deny review because "[t]he clear trend in the lower federal courts is to adopt the majority view." *Id.* at 18. "Clear trend" is something of an overstatement. Before 2007 a majority of the nine courts of appeals that had reached the issue held that § 1983 does provide a cause of action to enforce the IDEA.[1] Only

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[1] Such actions were then upheld in the Second, Third, Fifth, Sixth, and Seventh Circuits, but barred in the First, Fourth, Eighth, and Tenth Circuits. *Compare Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987); *W.B. ex rel. E.J. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995), *abrogated by A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007) (en banc); *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188, 1193 n.3 (5th Cir. 1990); *Gean v. Hattaway*, 330 F.3d 758, 773–74 (6th Cir. 2003); *Marie O. v. Edgar*, 131 F.3d 610, 621–22 (7th Cir. 1997) *with Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 28 (1st Cir. 2006); *Sellers ex rel. Sellers*

(Continued on following page)

in 2007 has the Ninth Circuit's position here commanded a narrow majority.[2] Where, as here, a decided conflict exists regarding an important issue of federal law, a grant of certiorari is warranted regardless of whether the decision below is in line with, or contrary to, the position of the larger number of the divided courts of appeals.

Respondents object that, despite the conflict regarding the availability of a § 1983 cause of action, "[a]ll circuit courts deciding the issue conclude that the IDEA does not provide a damages remedy." Opp'n 13. But whether the IDEA itself creates a damages remedy is not the question presented. The question presented concerns the meaning of § 1983. The assumed absence of a damages remedy in the IDEA is one of the reasons why the actual question presented is an important issue.

Respondents argue that the decisions of several of the courts of appeals recognizing a cause of action under § 1983 to enforce the IDEA are distinguishable because those cases involved only equitable relief. Opp'n 19, 21. Respondents do not claim that all of the

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v. Sch. Bd. of Manassas, 141 F.3d 524, 529 (4th Cir. 1998); *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996); *Padilla ex rel. Padilla v. Sch. Dist. No. 1, Denver*, 233 F.3d 1268, 1273–74 (10th Cir. 2000).

[2] This only became the majority position after the Ninth Circuit's decision in *Blanchard v. Morton School District*, 509 F.3d 934 (9th Cir. 2007) ("*Blanchard II*"), and the Third Circuit's decision in *A.W.*, 486 F.3d at 802–03.

cases recognizing such a § 1983 cause of action involved only equitable relief. For example, the Second Circuit's decision in *Weixel v. Board of Education of New York*, 287 F.3d 138 (2d Cir. 2002), upheld a § 1983 claim for damages based on a violation of the IDEA. *Id.* at 151.

Moreover, circuit court decisions recognizing a § 1983 claim for injunctive relief cannot on that ground be distinguished from the decision below. The Ninth Circuit below held that § 1983 can *never* be used to enforce the IDEA. Pet. App. 8. Respondents specifically urged the Ninth Circuit to adopt that per se rule.[3] In this Court, although respondents assert that § 1983 cases seeking equitable relief are distinguishable from § 1983 cases seeking damages, Opp'n 19, 21, they simultaneously argue that *all* § 1983 actions to enforce the IDEA are precluded, Opp'n 8.[4]

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[3] In the courts below respondents consistently insisted that there is no cause of action at all under § 1983 to enforce the IDEA, an argument that applied with equal force regardless of the relief sought. *E.g.*, Brief of Appelles [sic] at 6–7, *Blanchard II*, 509 F.3d 934 (No. 06-35388) ("Violations of the IDEA, which provides a comprehensive enforcement scheme to remedy violations of its provisions, cannot be remedied through § 1983."); Defendants' Motion for Summary Judgment ("Motion"), *Blanchard v. Morton School Dist.*, No. CV 02-5101 FDB (W.D. Wash.) ("*Blanchard III*") at 11 ("IDEA based claims are [not] enforceable under § 1983.").

[4] Respondents assert in their "counterstatement of question presented" that the issue in this case is whether § 1983 provides "a cause of action for damages" for a violation of the IDEA. *Id.* at i. But in the body of their brief, as they did in the courts below,

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Respondents' position below and before this Court that § 1983 is never available to remedy IDEA violations is consistent with circuits rejecting a § 1983 cause of action. Those circuits have repeatedly held that the IDEA precludes *all* claims under § 1983, regardless of the remedy requested.[5]

The resolution of the question presented turns on the meaning of § 1415(*l*), which respondents acknowledge was enacted to overturn *Smith v. Robinson*, 468 U.S. 992 (1984). Opp'n 11. Respondents insist that § 1415(*l*) does not permit *any* § 1983 cause of action, Opp'n 11, but suggest no reading of § 1415(*l*) under which the availability of a § 1983 claim would depend on what type of relief was sought. Thus, respondents acknowledge that the circuits are split as to the actual question presented and their attempt to distinguish some of the decisions of the circuits based on the type of damages sought is supported neither by the holdings of those cases nor by any proposed reading of § 1415(*l*) nor even by respondents' own position before this Court and below.

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respondents advance only the broader argument that § 1983 does not provide a cause of action to enforce the IDEA. *Id.* at 8.

[5] *Blanchard II*, Pet. App. 8; *A.W.*, 486 F.3d at 803 ("Congress did not intend § 1983 to be available to remedy violations of the IDEA."); *Padilla*, 233 F.3d at 1274 ("[Section] 1983 may not be used to remedy IDEA violations."); *Sellers*, 141 F.3d at 530 ("[S]ection 1415([*l*]) does not permit plaintiffs to sue under section 1983 for an IDEA violation.").

II. THIS INTER-CIRCUIT CONFLICT IS WELL ENTRENCHED.

Respondents argue that the existing inter-circuit conflict assuredly will disappear because the minority rule is wrong, and thus inevitably will be repudiated by the four circuits that now apply it. Opp'n 12, 19, 23. But in practice, inter-circuit conflicts do not invariably dissipate simply because the mistaken circuits sooner or later realize that they have erred. This Court grants review to address such conflicts because action by this Court is usually necessary to resolve such disagreements.

The conflict at issue in this case is a persistent one. The circuit split has existed since 1996, when the Eighth Circuit held that § 1983 cannot be used to enforce the IDEA, *Heidemann*, 84 F.3d at 1033, thus disagreeing with the Second Circuit's holding in *Mrs. W.*, 832 F.2d at 755.

Far from disappearing, in the last twelve years the conflict has widened. Since 1996, the Eighth Circuit has been joined by the First, Third, Fourth, Ninth, and Tenth Circuits,[6] while the Second Circuit has been joined by the Fifth, Sixth, and Seventh Circuits.[7]

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[6] *Diaz-Fonseca*, 451 F.3d at 28; *A.W.*, 486 F.3d at 802–03; *Sellers*, 141 F.3d at 529–31; *Blanchard II*, Pet. App. 7–8; *Padilla*, 233 F.3d at 1273–74.

[7] *Angela L.*, 918 F.2d at 1193 n.3; *Gean*, 330 F.3d at 773–74; *Marie O.*, 131 F.3d at 621–22. Respondent likewise suggests that

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In arguing that the minority view is incorrect, and thus inevitably will be abandoned, respondents repeatedly rely on this Court's decision in *Smith*. Opp'n 9–11, 17. Because *Smith* provides such "clear guidance," respondents insist, the minority view manifestly is incorrect and the circuit split is therefore "illusory." Opp'n 9. The Ninth Circuit below correctly recognized the existence of a circuit conflict regarding the question presented. Pet. App. 6–7. A circuit split is no less real merely because the decisions on one side may be wrong, or even clearly wrong. Indeed, the existence of an inter-circuit conflict necessarily means that one or more of the courts of appeals has adopted an incorrect interpretation of the law.

Nor is it true, as respondents suggest, that the circuits that follow the minority rule "have not yet had the opportunity to apply th[e] methodology" in *Smith*. Opp'n 23. All of the circuit court opinions adopting the minority rule were handed down after *Smith*, and most discuss that decision.[8] These circuits

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district courts in the Fifth Circuit have recently rejected *Angela L.* Opp'n 18, 22–23 (citing *D.B. ex rel. C.B. v. Houston Indep. Sch. Dist.*, No. Civ.A H-06-354, 2007 WL 2947443, at *11 (S.D. Tex. Sept. 29, 2007)). However, the *D.B.* court failed to cite or discuss *Angela L.* and appears to have been unaware of the district courts that have concluded that the availability of § 1983 actions is "well settled" in that circuit. Cert. Petition at 14–15 & n.4.

[8] *Marie O.*, 131 F.3d at 621–22 (citing *Smith*); *Angela L.*, 918 F.2d at 1193 n.3 (same); *Mrs. W.*, 832 F.2d at 754–55 (same).

had every opportunity to consider *Smith*; they simply disagreed with respondents' contention that, even after the enactment of § 1415(*l*), *Smith* bars § 1983 actions to enforce the IDEA.

Respondents also suggest that the circuit courts adhering to the minority view will now abandon that position in light of *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). Opp'n 23. But although suggesting that *Rancho* somehow "refined" *Smith*'s holding, Opp'n 20, 23, respondents do not explain how *Rancho* added in any way to the rule or methodology in *Smith*. To the contrary, the *Rancho* opinion repeatedly insisted it was only applying well-established precedent, including the then twenty-one year old decision in *Smith*.[9] Respondents suggest that the critical holding in *Rancho* was that the existence of a comprehensive statutory enforcement mechanism indicates that Congress intended that mechanism to be the exclusive means by which the statutory rights could be implemented. Opp'n 22. But that principle was not first announced in *Rancho*. Indeed, *Rancho* expressly noted that the rule had been established law since the 1981 decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20 (1981). 544 U.S. at 121.

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[9] *E.g.*, 544 U.S. at 119 ("[o]ur [post-1980] cases have made clear"); *id.* at 120 ("in *all* of the cases . . . we have emphasized" (emphasis in original)).

Rancho did not hold that the existence of a judicial remedy under one statute (here the IDEA) necessarily precludes use of § 1983 to enforce that statute. Instead, the Court expressly rejected any such rigid rule:

> The Government . . . urges us to hold that the availability of a private judicial remedy is not merely indicative of, but conclusively establishes, a congressional intent to preclude § 1983 relief. We decline to do so. The ordinary inference that the remedy provided in the statute is exclusive can surely be overcome by *textual indication*, express or implicit, that the remedy is to complement, rather than supplant, § 1983.

Id. at 122 (emphasis added, citation omitted).

The issue at the core of the question presented in the instant case, and underlying the division among the circuit courts, is whether § 1415(*l*) provides just such a "textual indication" that the IDEA does not supplant a § 1983 cause of action. Nothing in *Rancho* purported to interpret or even mention § 1415(*l*). The decision turned in large measure on the meaning of § 601(c)(1) of the Telecommunications Act, 544 U.S. at 126–27, which bears no resemblance whatever to the terms of § 1415(*l*).

In *Weixel*, the Second Circuit expressly held that § 1983 could be used to obtain damages for an IDEA violation. 287 F.3d at 151. Respondents argue that the Second Circuit is now certain to abandon *Weixel* because, one month later, that circuit held that

damages are not available under the IDEA itself. Opp'n 19–20 (citing *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 486 (2d Cir. 2002)).[10] But *Polera* itself expressly reiterated the established Second Circuit rule that such damages are available in a § 1983 action; the plaintiff in *Polera* was denied damages only because she had abandoned her § 1983 claim.[11]

Moreover, respondents ignore the fact that the Second Circuit has adhered to its holding in *Mrs. W.*, despite the later decisions in *Rancho* and *Polera*. Indeed, in *Smith v. Guilford Board of Education*, No. 06-1094-cv, 2007 WL 1725512 (2d Cir. June 14, 2007), the Second Circuit stated that "[i]t is well-settled that, while the IDEA itself does not provide for monetary damages, plaintiffs may sue pursuant to § 1983

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[10] Respondents assert that the action in *Weixel* was "surely" dismissed on remand in light of *Polera*. Opp'n 20. The district court proceedings in *Weixel*, available on PACER, reveal that the litigation continued for four years after *Polera*, and that the plaintiffs ultimately accepted a substantial monetary settlement offer from the defendants.

[11] As the *Polera* court explained: "We have held that monetary damages are available in claims brought pursuant to [§ 1983] . . . under the IDEA's predecessor statute, the EHA." 288 F.3d at 483 n.5 (citing *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141, 148 (2d Cir. 1983)). "District courts . . . have followed *Quackenbush*, holding that damages are available on claims brought under Section 1983 for violations of the IDEA. However, . . . Polera's Section 1983 claims were dismissed . . . and she has not appealed the decision." *Id.* (citation omitted). Thus, the *Polera* court concluded that "*Quackenbush* and its progeny do not dictate the outcome of this appeal." *Id.*

to enforce its provisions . . . and to obtain damages." *Id.* at **4. The *Guilford* court was surely aware of its own decision in *Polera*: in fact, it cited *Polera* for an unrelated point. *Id.* at **5. Thus, respondents' belief that the Second Circuit will abandon its long-established position is belied by the Second Circuit's explicit analysis.

III. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

This case presents an appropriate vehicle for resolving the question presented. The litigation below turned directly on whether § 1983 provides a cause of action to enforce the IDEA. That issue was squarely presented by the parties and expressly decided by the court of appeals and the district court. Pet. App. 8; *id.* at 16 n.2.

Even if § 1983 does provide a cause of action to enforce the IDEA, respondents contend that Ms. Blanchard's claim should be rejected because it is a "[counsel] fee request, disguised as a request for damages." Opp'n 5. Respondents suggest that the only damage Ms. Blanchard will be able to prove is the expenditure of time and effort in the IDEA administrative process, giving rise merely to a claim for "compensation based on *pro se* representation." *Id.* at 8. Such a quantum meruit claim, respondents note, would be barred by the rule that counsel fees are not awarded to *pro se* litigants. *Id.* at 6.

As respondents acknowledge, however, Ms. Blanchard's complaint did not seek compensation for effort devoted to the administrative process. Opp'n 1. Rather, the complaint asserted that she had sustained a "loss of profits."[12] The magnitude of actual lost business profits would be entirely different from a claim for *pro se* counsel fees, which would reflect the market value of time and effort expended in the administrative process.

In sworn statements, Ms. Blanchard explained that for more than ten years she had operated a home-based floral manufacturing business,[13] and that the time required to obtain compliance with the IDEA had severely curtailed her ability to operate that business. Ms. Blanchard stated that she had "lost my many long term customers during this time"[14] and sustained $25,000 in lost profits.[15] Ms. Blanchard provided respondents with financial records of her business for the relevant years.[16] In the district court, respondents did not dispute the truth of these assertions; rather, they maintained that "[a]ssuming as true Ms. Blanchard's statements . . . that she lost . . .

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[12] Complaint, *Blanchard III* at 8, 9.

[13] District's First Interrogatories and Request for Production, *Blanchard III* at 6 ("Interrogatories").

[14] Plaintiff's Declaration Opposing Motion for Summary Judgment, *Blanchard III* at 22.

[15] Interrogatories at 6.

[16] *Id.* at 7.

profits[,] . . . these are consequential damages which are not recoverable."[17]

At a subsequent stage of this litigation, of course, respondents would be entitled to dispute Ms. Blanchard's claim that she actually suffered lost business profits. On an appropriate showing they might even seek summary judgment on that issue. But in the proceedings below, respondents did not challenge the veracity of Ms. Blanchard's statements, and they failed to proffer evidence tending to show that the asserted loss of profits did not occur. At this juncture in the litigation, the record provides no basis for sustaining respondents' contention that the only factual support for any damage claim would be based on Ms. Blanchard's efforts in the administrative process rather than lost profits.

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[17] Defendants' Reply Brief in Support of Motion for Summary Judgment, *Blanchard III* at 11.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the Ninth Circuit.

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